

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [REDACTED] 1918

No. [REDACTED] 166

THE UNITED STATES OF AMERICA AND STEPHEN N.
GRANT, APPELLANTS,

v.

NEW ORLEANS PACIFIC RAILWAY COMPANY, W. R.
PICKERING LUMBER COMPANY, AND SOUTHLAND
LUMBER COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

FILED APRIL 4, 1918.

(25884)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 465.

THE UNITED STATES OF AMERICA AND STEPHEN N.
GRANT, APPELLANTS,

vs.

NEW ORLEANS PACIFIC RAILWAY COMPANY, W. R.
PICKERING LUMBER COMPANY, AND SOUTHLAND
LUMBER COMPANY.

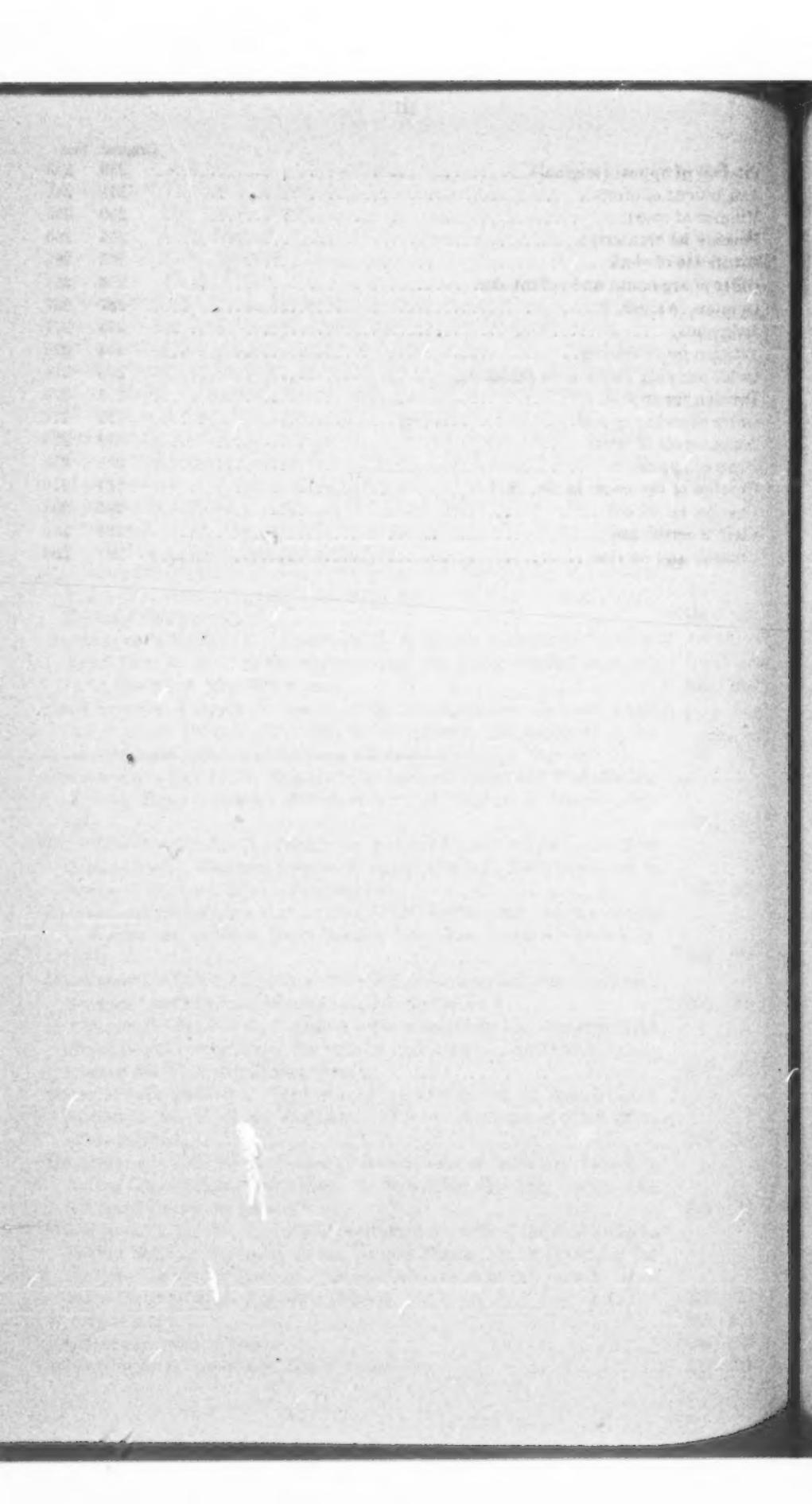
APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

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1 United States of America. United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on Thursday, November the eighteenth, A. D. 1915, at New Orleans, Louisiana, before the Honorable Don A. Pardee and the Honorable Richard W. Walker, circuit judges, and the Honorable Thomas S. Maxey, district judge.

THE UNITED STATES OF AMERICA AND STEPHEN N.

Grant, appellants,

versus

NEW ORLEANS PACIFIC RAILWAY COMPANY, W. R. PICK-
ering Lumber Company, and Southland Lumber
Company, appellees.

Be it remembered that, heretofore, to wit, on the 16th day
2 of December, A. D. 1915, a transcript of the record of the
above styled cause, pursuant to an appeal from the District
Court of the United States for the Western District of Louisiana,
was filed in the office of the clerk of the said United States Circuit
Court of Appeals for the Fifth Circuit, which said transcript was
filed and docketed in said Circuit Court of Appeals as No. 2870, as
follows:

On Friday evening, after much difficulty, we got
the boat out, and I took a walk up the river.

The river was very low, and the water was very
clear, so that I could see the bottom of the river.

I saw many fish, and I also saw some birds, such as
the Kingfisher, the Green Heron, and the Blue Heron.

I also saw some ducks, and I also saw some geese,
such as the Canada Goose, the Mallard, and the Gadwall.

I also saw some swans, and I also saw some pelicans,
such as the White Pelican, the Brown Pelican, and the Black Pelican.

I also saw some cormorants, and I also saw some terns,
such as the Common Tern, the Gull-billed Tern, and the Sooty Tern.

I also saw some gulls, and I also saw some boobies,
such as the Red-faced Booby, the Brown Booby, and the Blue-faced Booby.

I also saw some boobies, and I also saw some boobies,
such as the Red-faced Booby, the Brown Booby, and the Blue-faced Booby.

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UNITED STATES DISTRICT COURT, FIFTH CIRCUIT,
WESTERN DISTRICT OF LOUISIANA.

UNITED STATES OF AMERICA,

versus No. 947 In Equity.

NEW ORLEANS PACIFIC RAILWAY COMPANY,
W. R. PICKERING LUMBER COMPANY, and
SOUTHLAND LUMBER COMPANY.

STEPHEN N. GRANT.....INTERVENOR.

TRANSCRIPT.

Appeal Taken by Plaintiff and by Intervenor to the United States Circuit Court of Appeals, for the Fifth Circuit, United States District Court for the Western District of Louisiana.

APPEARANCES.

George Whitfield Jack, Esq.,
United States Attorney.

Robert A. Hunter, Esq.,
Assistant United States Attorney,
Solicitors for Complainant.

Don E. SoRelle, Esq.,
Solicitor for Intervenor.

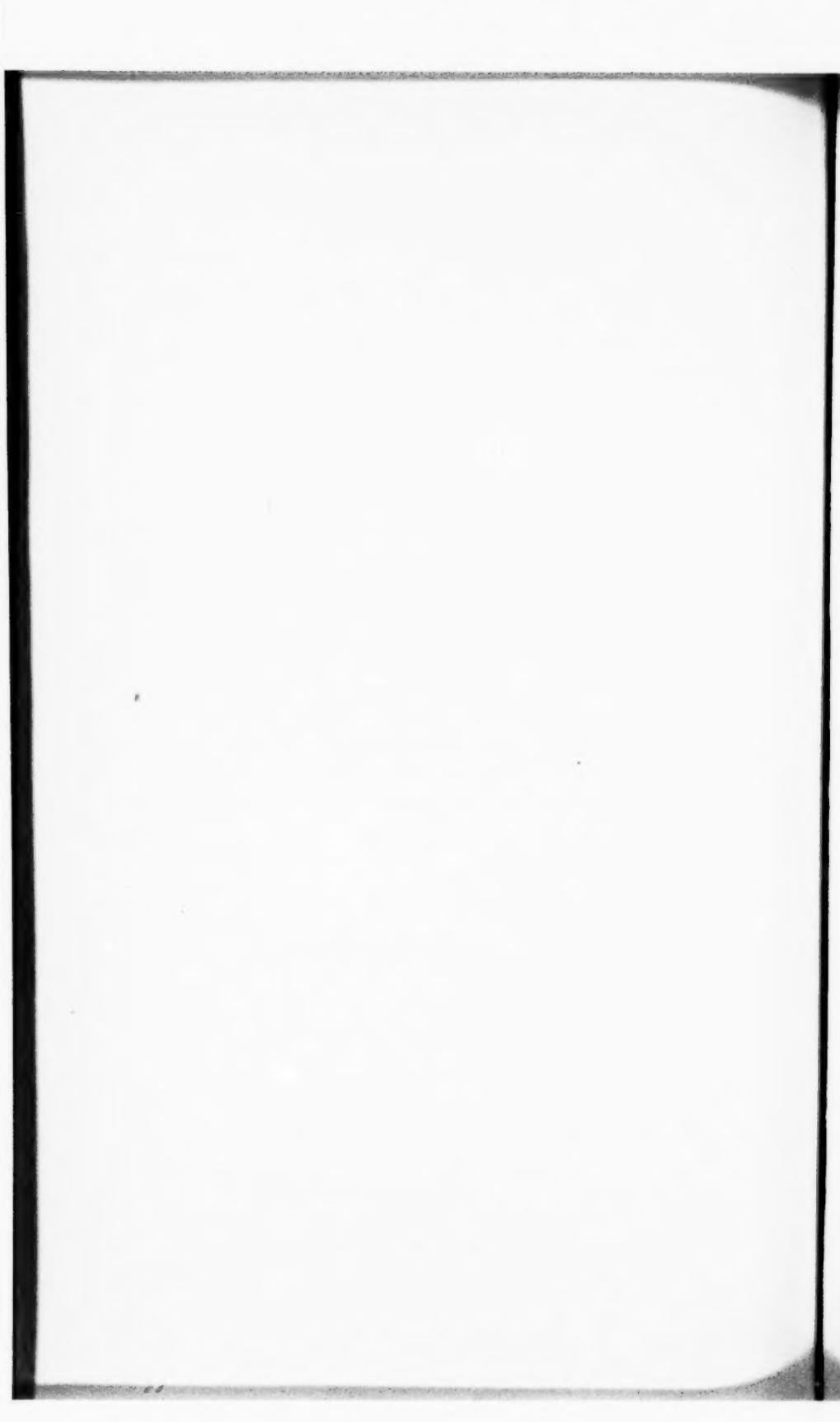
SOLICITORS FOR APPELLANTS.

Messrs. Hudson, Potts, Bernstein & Sholars,
Solicitors for New Orleans Pacific Railway Co.

Messrs. Blanchard, Smith & Palmer,
Solicitors for W. R. Pickering Lumber Co.

Messrs. Monk & O'Neal,
Solicitors for Southland Lumber Company.

SOLICITORS FOR APPELLEES.



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No. 947. In Equity.

UNITED STATES OF AMERICA

vs.

NEW ORLEANS PACIFIC RAILWAY COMPANY

and

W. R. PICKERING LUMBER COMPANY, LTD.,

and

SOUTHLAND LUMBER COMPANY.

To the Honorable Judge of the District Court of the United States for the Western District of Louisiana:

The United States of America, by Thomas W. Gregory, its Attorney General, brings this, its bill, against the New Orleans Pacific Railway Company, a corporation organized under the laws of the State of Louisiana, and the W. R. Pickering Lumber Company, Ltd., a corporation organized under the laws of the State of Louisiana, with its domicile at Pickering, Louisiana; and the Southland Lumber Company, a corporation organized under the laws of the State of Louisiana, with its domicile at Hornbeck, Louisiana.

And for its cause of action states:

1.

That the United States, by Act of Congress approved on March 3, 1871, granted certain lands in that act described to a certain railroad corporation, to-wit: The New Orleans, Baton Rouge & Vicksburg Railroad Company; that thereafter the said New Orleans, Baton Rouge & Vicksburg Railroad Company assigned its rights under said grant to an-

other certain railroad corporation, to-wit: The New Orleans Pacific Railway Company. That on the 3rd day of March, 1885, a certain land patent was issued by and in the name of the United States as grantor granting to the New Orleans Pacific Railway Company as grantees certain lands in the Parish of Vernon, State of Louisiana, which said patent included among other lands the following described tracts:

South Half of the Northwest quarter, and the North Half of the Southwest Quarter, Section 3, Township 3 North, of Range 7 West, Louisiana Meridian.

Plaintiff states that said land, situated in said 2 parish and state aforesaid, was illegally and erroneously included in said patent, and that said patent should now be cancelled, in so far as it covers and embraces said land illegally included in it, for the reasons as hereinafter fully set forth. Plaintiff states that the assignment of said land grant from the New Orleans, Baton Rouge & Vicksburg Railroad Company to the New Orleans Pacific Railway Company, referred to in paragraph one, was, by Act of Congress approved February 8, 1887, ratified and confirmed as to the portion of the grant not declared forfeited by said last named Act to the New Orleans Pacific Railway Company, the said lands to be located in accordance with the maps filed by the said New Orleans Pacific Railway Company in the Department of the Interior of the United States of America, October 27, 1881, and November 17, 1882, which indicate the definite location of said road.

2.

Plaintiff states that at the respective dates of the original grant by Congress, definite location of the line of the road by filing of maps, the issuance of the patent by the United States, the confirmation of the grant, all as above set forth, said land constituted a part of the public domain of the United States.

3.

Plaintiff states that the second section of said Act of Congress of February 8, 1887, ratifying and confirming to the New Orleans Pacific Railway Company certain of the lands included in the original grant of March 3, 1871, to the New Orleans, Baton Rouge & Vicksburg Railroad Company contained the following provision:

"That all said lands occupied by actual settlers at the date of the definite location of the said road and still remaining in their possession, or in the possession of their heirs or assigns, shall be held and deemed excepted from said grant and shall be subject to entry under the public land laws of the United States."

Which provision, plaintiff states, applied to lands at that time patented as well as to lands thereafter to be patented.

4.

Plaintiff states that the third section of said Act of Congress of date of February 8, 1887, provided that the confirmation of the said grant to the said New Orleans Pacific Railway Company should take effect when the said company should accept the provisions of the Act, in the manner therein prescribed, and agree to discharge all of the duties and obligations imposed upon its assignor by the Act of March 3, 1871; and plaintiff avers that the said New Orleans Pacific Railway Company thereupon, on April 20, 1887, filed with the Secretary of the Interior such acceptance, and so accepted the provisions of said Act in the manner therein prescribed and agreed to discharge all the obligations and duties imposed by said acts, herein referred to.

5.

Plaintiff further states that the said New Orleans Pacific Railway Company, in order to facilitate an early ad-

justment of such land grant, filed in said Department of the Interior an agreement, bearing the date of August 3, 1892, the third section of which provides:

3 "That in the cases where patents have issued to said railway company for lands which have been or may hereafter be adjudged by the Commissioner of the General Land Office to have been in possession of actual settlers at the date of the definite location of said railway company's road, and title is in said railway company, and said trustees agree to make, without delay, conveyance thereof to the United States, and where such have been sold by said railway company to third persons, said railway company undertakes to recover title thereto, without delay, and convey the same to said settlers or to the United States; and the said trustees undertake to join in such conveyances and to do all acts necessary on their part to enable the railway company to carry out this agreement and stipulation.

6.

Plaintiff states that prior to, and at the time of, the filing of said maps by the New Orleans Pacific Railway Company, showing the definite location of its road, as hereinabove set forth, and at the time of the passage of the said Act of Congress of February 8, 1887, the land described in the first paragraph of this bill, namely, the South Half of the Northwest Quarter, and the North Half of the Southwest Quarter, Section 3, Township 3 North, of Range 7 West, Louisiana Meridian, was occupied by, and in possession of Thomas J. Killen and Stephen N. Grant, respectively: Thos. J. Killen being on the land at the time of the filing of the said maps, and Stephen N. Grant, his assignee, being on said tract of land at the time of the passage of the Act of February 8, 1887, who were then and there

actual settlers and in all respects qualified to enter public lands of the United States under the homestead laws thereof, and the inclusion of the said land in the patent issued to the New Orleans Pacific Railway Company on the 3rd day of March, 1885 hereinabove referred to, was, therefore, erroneous. Plaintiff states that the said Stephen N. Grant filed an application to enter as a homestead the said tract of land, and after a hearing was had thereon, pursuant to the rules and regulations of the plaintiff's Land Department, a decision was rendered in the settler's favor and against the said New Orleans Pacific Railway Company by the Commissioner of the General Land Office on

as shown by docket number

which said contest and decision embraced all of the land in this paragraph described. Plaintiff states that the Commissioner of the General Land Office of said Department of the Interior found and held said land to have been erroneously patented to the said New Orleans Pacific Railway Company, because it was, as aforesaid, occupied by the said Thomas J. Killen at the time of the definite location, as aforesaid, of the said road, and remained in the possession of Stephen N. Grant, the said Killen's assignee at the time of the said contest.

7.

Plaintiff states that the said New Orleans Pacific Railway Company was duly notified by the Department of the Interior of said decision, and requested to restore the title to said land to the United States, and to comply with the conditions of its agreement of August 3 1892,

4 hereinabove referred to, with which said request the New Orleans Pacific Railway Company did not comply, and thus failed to perform the conditions of its said agreement of August 3, 1892, as above set forth, and failed to restore said land in compliance with its said contract in that regard.

8.

Plaintiff avers that all lands within the exterior limits of the grant made to the said railway company which were occupied by actual settlers at the date of the definite location of the line of road of said company and remaining in the possession of [of] such settlers, their heirs or assigns, on the date of the passage of the Act of Congress of February 8, 1887, aforesaid, were specifically excepted from the grant made by said Section 2 of said act, and that the erroneous inclusion in the patent to the said railway company on the 3rd day of March 1885, of the above described tract of land, which was at that time occupied by an actual settler, as aforesaid, was illegal and without warrant of law, and that the said patent in so far as it includes said tract should be cancelled by decree of this court, to the end that the plaintiff may convey the title thereto to the said homestead claimant, his heirs or assigns, as it is made plaintiff's duty to do by the several acts of Congress aforesaid.

9.

Plaintiff avers that said described tract of land is now claimed by W. R. Pickering Lumber Company, Limited, and the Southland Lumber Company under mesne conveyances from the said New Orleans Pacific Railway Company, which companies had full knowledge and notice of the rights and occupancy of the said actual settler and who therefore acquired the title subject to such settler's rights and equities.

10.

Wherefore plaintiff prays the judgment and decree of this court (1) cancelling and declaring null and void said patent issued to the said New Orleans Pacific Railway Company on the 3rd day of March, 1885, in so far as the same includes the said South Half of the Northwest Quarter, and the North Half of the Southwest Quarter, Section 3, Township 3 North, of Range 7 West, Louisiana Meridian, in the

Parish of Vernon State of Louisiana, and also cancelling defendants', the W. R. Pickering Lumber Company, Ltd., and the Southland Lumber Company's deeds to said land, or if the foregoing relief shall be denied, (2) that a decree be entered declaring the title held by the W. R. Pickering Lumber Company, Ltd., and the Southland Lumber Company defendants, to be in trust for the said Thomas J. Killen, the homestead settler, or his heirs or assigns, and the latter be decreed to be the owner of said land and that the defendants the W. R. Pickering Lumber Company, Ltd.,
 5 and the Southland Lumber Company be directed to make, execute and deliver to the said Thomas J. Killen settler, his heirs or assigns, a deed conveying all their right, title and interest to the said land, and in their default or failure to do so that such deed be made by the clerk or some other person duly appointed thereto by this honorable court, and

That the court grant such further relief as the nature of the case may require.

THOS. W. GREGORY
 Attorney General of the United States.
 GEO. WHITFIELD JACK
 United States Attorney
 For the Western District of Louisiana.

Service acknowledged & citation waived this Jan. 16" 1915—reserving all rights, equities, defenses & legal delays.

HUDSON, POTTS, BERNSTEIN & SHOLARS
 Attys. for N. O. P. Ry. Co.

ENDORSED: No. 947.

United States District Court, Western District of Louisiana. United States vs. New Orleans Pacific Railway Company, and W. R. Pickering Lbr. Co. Ltd., and Southland Lbr. Co.

BILL OF COMPLAINT.

Filed Jan. 21, 1915, Leroy B. Gulotta, Clerk, U. S. District Court, West Dist. of Louisiana.

6 In the United States District Court West-
ern District of Louisiana For the
Shreveport Division.

No. 947 In Equity.

UNITED STATES OF AMERICA,

Plaintiff

versus No. 947 In Equity.

THE NEW ORLEANS PACIFIC RAILROAD CO.,
ET ALs,

And Defendants.

THE SEPARATE ANSWER OF THE NEW ORLEANS
PACIFIC RAILROAD COMPANY

And now comes the New Orleans Pacific Railroad Company, made defendant in the above entitled and numbered cause, and appearing separately, moves the court to dismiss and reject the bill filed herein by the United States Government, upon the following grounds and for the following reasons, to-wit:

A.

Defendant offers, pleads, excepts and shows that neither Thomas W. Gregory, Attorney General of these United States, nor George Whitfield Jack, United States Attorney in and for the Western District of Louisiana, had or have the right or authority to bring, institute, or prosecute this suit for the reason that the Government of the United States of America has no interest in fact and alleges no interest in the property involved in this suit; it is not alleged that any fraud has been perpetrated upon the Government or that it is in any way prejudiced, nor is it alleged that the Government is under the obligation to any individual or individuals to make good any purported title by setting aside the patent herein attacked for fraud or for any other reason; and it is not alleged nor a fact that there is any public duty or necessity requiring this action to be brought.

Wherefore, Defendant pleads that this, its exception to the right, authority and capacity of the Government, through its said officers, the Attorney General and the United States Attorney, be sustained and the bill be dismissed accordingly.

B.

Defendant offers, pleads, excepts and shows that the bill to be dismissed for want of equity and it especially pleads against the right and propriety of the United States to prosecute it [in] said bill the doctrine of laches and equitable estoppel and shows that a period of thirty years has elapsed since the issuance of the patent herein sought to be set aside, during which time no attack has been made thereon, and in faith whereof the title to the lands covered thereby has been transferred many times and has passed by mesne conveyances into the hands of remote and bona fide purchasers and on the faith and reliance of said patent and others similar thereto one of the main industries of the State of Louisiana has been built up, which the destruction of their titles would utterly ruin. Defendant shows that the United States, Plaintiff, is only a nominal party, merely formal, and that the suit is brought in its name to enforce the pretended private rights of individuals and no interest of the Government is involved and the litigation is being carried on at its expense and in its name in behalf of and for the benefit of private parties who claim to have equitable titles to or rights in or to the lands in question by virtue of prior settlements or donations, and that the effect and only effect of a decree cancelling this patent as prayed for would be simply to enable these said third parties to perfect any equitable claims or titles they might have or become possessed of after thirty years have elapsed since the 7 patent to said land was issued to this defendant, and such individuals urging these equitable claims are the real parties in interest in this litigation and the United States Government is not a real party, but merely a nominal or formal party in interest.

Wherefore, Defendant pleads and so pleading prays that this its plea of laches and equitable estoppel be sustained as depriving said bill of all equity and this cause dismissed accordingly.

C.

Defendant offers, pleads, excepts and shows that the bill herein should be dismissed and rejected because the titles of these Defendants have been confirmed, secured and rendered immune from attack by the United States for any cause, whatever, by the prescription, limitation and confirmation of the Acts of Congress of March 3, 1887, (24 Stat. L. 556, ch. 376); March 3, 1891 (26 Stat. L. 1093); and March 2, 1896 (29 Stat. L. 42 ch. 39), which prescription of five years and limitation and confirmation established by the said acts is hereby especially plead both in bar of the action and affirmatively, as a muniment of title.

Wherefore, Defendant pleads and, so pleading, prays that this its plea of prescription, limitation and confirmation be sustained and the bill dismissed accordingly.

And this defendant tenders the above motions, exceptions and pleas in limine and prays that the same may be separately heard and disposed of before the trial of the case on its merits, and that upon said hearing, that they be sustained and the bill dismissed and rejected upon the grounds and for the reasons therein set forth and that this be done at the cost of the Plaintiffs.

And now, reserving the benefit of the above and foregoing pleas of want or right of authority, want of equity, laches and estoppel, and prescription, limitation and confirmation, this defendant answers the allegations of the plaintiff's petition as follows, to-wit:

I.

Defendant admits the allegations of the first paragraph of the first section of the Plaintiff's petition; Defendant

denies each and every allegation contained in the second paragraph of the first section of plaintiff's petition. Defendant especially denies that the lands therein mentioned were illegally or erroneously included in said patent, or that the latter should be now cancelled for any reason. Defendant denies the tenor and effect of the Act of Feb. 8, 1887, as set forth in plaintiff's petition, but admits the passage of the Act of Feb. 8, 1887, by the Congress of the United States for the objects and purposes clearly set forth in the said act. Defendant admits the date of definite location of the New Orleans Pacific Railroad as alleged but denies the force and effect alleged by plaintiff on account thereof.

II.

Defendant admits that the land in question was a part of the public domain until the title thereto was by Act of Congress vested in this Defendant or its predecessor in interest, the N. O. B. R. & V. Railway Co., but specifically denies that at the time of the confirmation of the grant as alleged that the land was a part of the public domain in the sense Plaintiff alleges and construes and the effect and conclusion which Plaintiff seeks to establish by its section two are specifically denied and rejected.

III.

Defendant admits the existence of the second section of the Act of Feb. 8, 1887, as a part of the said Act but denies specifically each and every allegation, conclusion, inference and deduction relative thereto made by the Plaintiff in section three of its petition.

IV.

Defendant admits the allegations of the fourth section of the Plaintiff's petition as matters of historical fact but denies the deduction, inference and conclusions Plaintiff seeks to draw therefrom.

V.

Defendant admits the allegations of section five of Plaintiff's petition, as an historical fact but denies specifically each and every deduction, conclusion and inference Plaintiff seeks to draw therefrom.

VI.

Defendant denies each and every allegation of section six of the Plaintiff's petition and each and every deduction, inference or conclusion sought to be drawn therefrom and on the trial hereof will require strict and legal proof of the same.

VII.

Defendant denies each and every allegation of section seven of the Plaintiff's bill and each and every deduction, inference and conclusion sought to be drawn therefrom and on the trial hereof will require strict and legal proof of the same.

VIII.

Defendant denies each and every allegation of section eight of the Plaintiff's petition and each and every deduction inference and conclusion sought to be drawn therefrom and upon the trial hereof will require strict and legal proof of the same.

IX.

Defendant has not the necessary information upon which to base an admission or a denial of the allegations of section nine of plaintiff's petition relative to the present ownership of the N. O. Pac. title but for the purpose of requiring strict and legal proof thereof denies same as alleged, and denies, specifically each and every other allegation of said section of Plaintiff's petition and each and every deduction, inference and conclusion, sought to be draw [drawn] therefrom, and upon the trial hereof will require strict and legal proof of the same.

X.

Defendant denies that the Plaintiff is entitled to the relief prayed for in the prayer of the petition as set forth in section ten thereof, but avers that the alternative prayer, being No. 2, thereof, makes clear and beyond question the motive, for, and the character of the relief sought and shows the lack of interest of the United States itself and renders absolute the exceptions and motions in this answer plead.

XI.

Further answering, this Defendant shows that it is not at this time and for a long time prior hereto it has not been possessed of the title to the lands in question nor to any of the lands patented to it under its grant, but that it sold the same to various and sundry parties, who paid value for the same and bought in entire good faith and in reliance upon the patent of the United States, except that this Defendant owns about a thousand acres of such land, which does not comprise the land herein sued for and as to which this defendant is now and has at all time been ready and willing to perform each and every obligation which is within its power of performance and which it is under a duty to perform by Act of Congress or special contract. Defendant shows that its deeds of transfer of these lands were special warranty deeds with the warranty of title being limited to its own acts. Defendant shows that it has an interest in this litigation and the outcome thereof by reason of its duties and liabilities to its transferees and arising under the acts of Congress aforesaid.

XII.

Further answering this, Defendant shows that the plaintiff is not entitled to the relief sought by virtue of the Act of Feb. 8, 1887, because:

(a) The lands here in question were and are not, have never been and cannot be held, deemed or considered to be or to have been subject to or in any manner affected by the said Act of Feb. 8, 1887, or any of its terms, pro-

visions or conditions as is contended for by the Plaintiff, but that its title thereto vested under and by virtue of and rests upon previously existing laws, to-wit: the act of March 3, 1871.

(b) The said land was not possessed by actual settlers or the heirs or assigns of such actual settlers under the terms of the said provisio of section two of the said Act of Feb. 8, 1887.

(c) The said Act of Feb. 8, 1887, does not in any manner apply to lands lying within the indemnity limits of said grant.

(d) The Act of Feb. 8, 1887, does not apply to lands which were patented previously thereto except to confirm the titles to such lands and to permit the operation of the so-called "Blanchard Robinson [Robinson] Agreement"as to such lands under the terms and provisions of the said Act.

(e) Defendant further shows that it complied with all of the Acts of Congress under which the said lands were obtained and that the title which vested in it thereby was absolute and indefeasible, as evidenced by the said patents.

(f) Defendant shows that the prescription, limitation and confirmation established by the Acts of Congress plead in Defendant's exception and motion in limine No. C, supra, operates as a rule of property and confirms and establishes property rights in this Defendant and its transferees and as such said Acts are hereby set forth and affirmatively plead.

(g) Defendant avers that the construction of the Act of Congress of Feb. 8, 1887, which is urged by the Plaintiffs, would render the Act unconstitutional, null and void as divesting vested rights, impairing the obligations of contracts, taking property without due process of law, and denying the equal protection of the laws, all in violation of any contrary to the provisions, in letter and spirit, of section ten of article one and the fifth amendment to the constitution of the United States, which unconstitutionality is hereby especially urged and plead.

(h) Defendant shows that there was at and prior to the passage of the Act of March 8, 1871, an United States District land office open and existing at Natchitoches, within whose jurisdiction the lands here in question were located, and that these said lands had been surveyed and the lines established by an official United States survey and well known generally and available and that there was nothing to prevent any claimant from taking any and all steps necessary and prerequisite under the public land laws to initiate his claim thereto, to file any homestead application or pre-emption claim or assert any right or claim which he might have under the laws for the desposition of the public domain, which action Defendant alleges these settlers should have taken and not taking preserved no rights as against the Government or its grantees and having obtained none under any subsequent Acts of Congress or otherwise cannot now be heard to question the legal title.

Wherefore, Defendant prays, that its motion in limine, plead first above be so heard and sustained as above prayed, and Defendant further prays that after trial hereof, in case such a trial be had, that the answer and the affirmative defense herein set up be held and deemed good in law and
in equity and that a decree be entered herein confirming and quieting the patent issued to this Defendant, New Orleans Pacific Railroad Company, for its own benefit and for the use and benefit of its assigns and transferees, and rejecting and dismissing at its own cost the petition and demands of the Plaintiff's herein.

Defendant Further prays, for all equitable and general relief in the premises as is just and proper to this Honorable Court seems meet.

HUDSON, POTTS, BERNSTEIN & SHOLARS
Attorneys for the N. O. Pac. Railroad Co.

ENDORSED: No. 947 in Equity. United States District Court, Western District of Louisiana. Shreveport Division. United States of America, Plaintiff versus New

Orleans Pacific Railway Company, W. R. Pickering Lumber Co., Ltd., Southland Lumber Company, Defendants. Separate Answer of the New Orleans Pacific Railway Company. Filed Apr. 20, 1915, Leroy B. Gulotta, Clerk. U. S. District Court, West Dist. of Louisiana.

11 In the District Court of the United States for the Western District of Louisiana.

No. 947 In Equity.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NEW ORLEANS PACIFIC RAILWAY COMPANY,
and

W. R. PICKERING LUMBER COMPANY,
and

SOUTHLAND LUMBER COMPANY,
Defendants.

And now comes the W. R. Pickering Lumber Company, one of the defendants herein, and, appearing separately, moves the Court to dismiss and reject the bill filed herein because an Act of Congress, approved March 3, 1891, provides that all suits by the United States to vacate and annul any patent issued prior to its passage should be brought within five years from the passage thereof, and an Act approved March 2, 1896, provides that all suits by the United States to vacate and annul any patent theretofore issued under any railroad or wagon road land grant should be brought within five years from the date of the passage of the said Act.

And your respondent shows that, as by said bill appears, the patent herein sought to be annulled was issued prior to the passage of both the said Acts of Congress of

the United States; that is to say on March 3, 1885, as said bill alleges, and the bill herein, being a suit to vacate and annul the said patent was filed in your Honorable Court on the 21st day of January, 1915, and that hence under both the said acts of Congress, the time within which the Government could have brought this suit to vacate and annul the patent issued to the New Orleans Pacific Railway expired long prior to the filing of this bill in your Honorable Court, and to the issuance of the subpoena herein.

Defendant further pleads against the right and propriety of the United States to prosecute its said bill the doctrine of equitable laches and of estoppel, and shows that a period of thirty years has elapsed since the issuance of said patent, during which time no attack has been made thereon; and in faith whereof the title to the lands covered thereby has been transferred and has passed by mesne conveyances into the hands of remote bona fide purchasers; that the United States, Complainant, is only a formal party and that the suit is brought in its name to enforce the pretended rights of individuals and no interest of the Government is involved and the litigation is being carried on in behalf of and for the benefit of private parties who claim to have equitable titles or rights in or to the lands by virtue of prior settlements or donation, and that the effect of a decree cancelling this patent would be simply to enable some other parties to perfect any equitable titles which they may have after thirty years have elapsed since the patent was issued, and such individuals are the real parties in interest in this litigation and the United States, complainant, is only a nominal party and is not the real party in interest.

Neither Thomas W. Gregory, Attorney-General of the United States, nor George Whitfield Jack, United States Attorney for the Western District of Louisiana, had right or authority to bring or institute this suit for the reason that the United States Government has no interest, and alleges no interest in the property involved in this suit, and it is not alleged that any fraud has been perpetrated on the Gov-

ernment to its prejudice; nor is it alleged that the Government is under obligation to any individual to make his title good by setting aside fraudulent patents, nor is it alleged that there is any duty on the part of the Government to the party requiring this action to be brought.

12

And this defendant therefore tenders this, its motion in limine, based upon the prescription and limitation set forth and the equitable laches and estoppel above pleaded, and the plea to the right of the Attorney-General or the District Attorney to institute this suit, and prays that the same may be separately heard and disposed of before trial of the case, and that upon said hearing, it be sustained, and the bill dismissed and rejected at the cost of complainant.

And now reserving the right of the above and foregoing pleas of prescription and limitation, laches and estoppel, and the plea to the right of the Attorney-General or the District Attorney to bring this suit, and only in case same should be overruled, this defendant, the W. R. Pickering Lumber Company, answers with reference to the land described in the Bill of Complaint, which land is owned by this defendant, and with reference to same, says:

1.

Defendant admits the allegations of Section One (1) of the Bill; except that it specifically denies that the land involved in this cause was illegally and erroneously included in the said patent of the United States to the New Orleans Pacific Railway Company of March 3, 1885; and they deny that said patent should be cancelled, in so far as it covers and embraces said land.

2.

Defendant admits the allegations of Section Two (2) of the Bill; except as to the confirmation of the grant by Act of Congress of February 8, 1887, and shows that Complainant was completely and irrevocably divested of title by the Act of Congress of March 3, 1871, and by the issuance

of patent of March 3, 1885; and defendant avers that the Public Land Office was open and in existence at Natchitoches, Louisiana, in whose district and under whose jurisdiction the land was situated; that the said land was surveyed and the hereinafter mentioned Thomas J. Killen and Stephen N. Grant could, and should have filed their homestead applications within the delays prescribed by law.

3.

Defendant admits that the words quoted in paragraph Three (3) of the Bill are an exact quotation of the proviso to Section Two (2) of the Act of February 8, 1887, but denies that the said act applied to lands at that time patented as well as lands thereafter to be patented.

4.

Defendant admits the allegations of Section Four (4) of the Bill as matters of fact, but denies the legal conclusions that complainant seeks to draw therefrom.

5.

Defendant admits the allegations of Section Five (5) of the Bill, as matters of fact, but specifically denies that this defendant, the W. R. Pickering Lumber Company, is or can be bound or precluded in any way by said agreement of August 3, 1892, or any of its provisions or clauses, because the New Orleans Pacific Railway Company had, prior to that date, sold such land to this defendant's authors in title, as will be hereinafter more clearly set forth.

6.

Defendant delines all and singular the allegations of Section Six (6) of the Bill.

7.

This defendant is not sufficiently informed as to the allegations of Paragraph Seven (7) of the Bill, to enable it to answer, and therefore denies same, and, further answering, avers that for the reasons set forth in the preceding

paragraphs of this answer, and particularly in paragraph five (5) and six (6) defendant is not affected or precluded by the matters named in section seven (7) of the
13 Bill, because said matters are alleged to have occurred long after the New Orleans Pacific Railway Company had sold the land to defendant's authors in title.

8.

Defendant denies that complainant is entitled to any relief by virtue of the Act of Congress of February 8, 1887, because:

(1) The land here in question were and are not, have never been, and cannot be held, deemed or considered to be subject to, or in any manner affected by the said Act of February 8, 1887, or by any of the terms, provisions or conditions thereof.

(2) The said land was not possessed as alleged by actual settlers nor the heirs or assigns of actual settlers under the terms of the said proviso.

(3) Defendant further represents that the New Orleans Pacific Railway Company complied with all the acts of Congress under which the said lands were obtained, and that the said patent vested in said New Orleans Pacific Railway Company and in its transferees and assigns absolute and indefeasible title to the said land as shown by the recitals of the said patent, the said land having been duly selected and the said selection having been duly approved.

Defendant further shows that the said sales and said transfers above set forth were made in good faith for a valuable consideration without notice of any defect in the title and vested complete legal and indefeasible title in the said vendees on the execution and passing of the said Acts of Congress respectively, and that said vendors were each seized in fee thereof; and that during the said ownership as above set forth, each held, owned and possessed the lands peaceably as the sole, legal and bona fide owner thereof. That the consideration expressed in said deeds attached

hereto and made a part hereof were bona fide and truly paid, and that the vendees in said deeds were without notice of any outstanding claims to said land or defects in said title previous to and down to the time of paying said consideration and the delivery of said deeds; and defendant denies that it, or its authors in title had any notice of any settlement, occupancy of, or that any homestead, pre-emption, or other claims had attached to the land. And further shows that the title to the said lands under the patents issued to the New Orleans Pacific Railway Company has been confirmed by the Act of Congress of March 3, 1887, March 3, 1891, and of March 2, 1896, the latter of which provides in the first section thereof, that suits to annul patents to lands heretofore erroneously issued to any railroad or wagon road grant, shall only be brought within five years from the passage of the Act, and to vacate and annul any patents thereafter issued within six years from the date of the issuance of said patent, and the said Section further provides:

"But no patent to any lands held by bona fide purchasers shall be vacated and annulled, but the right and title of such purchaser is hereby confirmed."

Which said Acts of Congress, and the several provisions thereof, and especially the portion of the Act of March 2, 1896, just above quoted, are pleaded as muniments of title of defendant, specially confirming, if any confirmation is necessary, the title to the lands described by complainant, as bona fide purchasers of same by virtue of the chain of title as above set forth.

And defendant further pleads the provisions of the said Acts of Congress, March 3, 1887, March 3, 1891, and March 2, 1896, in bar of this suit, and shows that any right which complainants may have had at any time to institute this suit, has long since prescribed.

(4) And awarding and issuance of the aforesaid patent by the United States, through its duly authorized de-

partment, was a final and conclusive adjudication by a legally constituted tribunal charged by law with the duty of determining all the facts legally prerequisite to the issuance of said patent, and said adjudication was final and conclusive and is not open to said attack, as is set forth by complainant herein, or at the time hereof.

14 5. This defendant further alleges that the sales and transfers of the land in question above set forth, were made in good faith and for a valuable consideration and vested a complete, legal, and indefeasable title in the vendees of the New Orleans Pacific Railway Company and in the various vendees, predecessors in title of this defendant, and alleges that on the execution and passing of the said acts of conveyance respectively, that during the time of ownership of each of the predecessors in title of this defendant, each thereof held, owned and possessed the said lands peaceably as the sole, legal, and bona fide owners thereof; and this defendant alleges that it is a bona fide purchaser of the lands in question, having paid therefor the full reasonable cash value of said land, at the date of its purchase, and alleges that even if it should be proven that any error or irregularity was made in the issuance of the patent by the Government to the New Orleans Pacific Railway Company, yet such error or irregularity cannot be imputed to this defendant, defendant being a bona fide purchaser for value without notice of such error or irregularity and in actual ignorance thereof.

9.

Defendant denies all the allegations of Section Nine (9) of the Bill.

10.

Defendant denies that complainant is entitled to the relief prayed for the in the prayer to the Bill.

11.

Further answering, defendant avers that it has owned and possessed the land in good faith under deeds translative

of property duly recorded in the Conveyance Books of Vernon Parish, Louisiana, by virtue of the following chain of title, viz:

15 NORTHWEST QUARTER OF SOUTHWEST QUARTER, SECTION THREE, TOWNSHIP THREE, NORTH, RANGE SEVEN WEST.

1. From U. S. entrys selections November 8, 1883, by N. O. P. Ry. Co., per approved list No. 2.
2. Patent United States to New Orleans Pacific Railway Co. dated March 3, 1885, recorded Book D, page 120, date of recording not shown in abstract.
3. New Orleans Pacific Railway Company to John M. Dillon and Henry M. Alexander, Trustees, mortgage dated April 17, 1883, recorded May 3, 1883, in Book C of mortgages, page 50.
4. New Orleans Pacific Railway Company by E. B. Wheelock, President, and Wm. L. Nicholson, Secretary, to John M. Dillon, and Henry M. Alexander, Trustees, mortgage dated April 17, 1883, and filed August 7, 1897, recorded in Book E of mortgages, page 366.
5. New Orleans Pacific Railway Company by E. B. Wheelock, President, and Wm. L. Nicholson, Secretary, to John M. Dillon, and Henry M. Alexander, Trustees, mortgage dated January 5, 1884, filed August 10, 1897, recorded Book E of mortgages, page 390.
6. New Orleans Pacific Railway Company by E. B. Wheelock, President, and Robert Strong, Secretary, and John M. Dillon and Henry M. Alexander, Trustees, to Smith H. Mallory, deed dated April 1st, 1889, filed December 9, 1889, recorded Book D, page 566.
7. S. H. Mallory and Annie L. Mallory, his wife, to Joseph Fisher, warranty deed dated April 16, 1898, filed May 15, 1898, recorded Book L, page 96.

8. Contract between Joseph Fisher and C. S. Searing dated December 24, 1897, filed December 28, 1899, recorded Book E of mortgages, page 607.
9. Succession of Joseph Fisher, Probate No. 311, heirs Joseph Fisher a major and Statie Fisher a girl, minor, inventory April 20, 1900, extract of inventory Book E of mortgages, page 694. Minors mortgage cancelled February 16, 1905, by authority duly received in Book EE of mortgages, page 137.
10. C. S. Searing and Fannie S. Searing hiw [his] wife, to Statie M. Fisher, quit claim dated May 24, 1901, filed July 8, 1901, recorded Book P, page 602.
11. C. S. Searing to Statie M. Fisher, receipt dated June 8, 1901, filed July 8, 1901, recorded Book P, page 605.
12. C. S. Searing to Statie M. Fisher, receipt dated January 28, 1901, recorded July 8, 1901, Book R. of mortgages, page 95.
13. Statie M. Fisher et al. to W. R. Pickering Lumber Company, warranty deed dated 15 day of August, 1902, filed 26th day of August, 1902, and recorded in Book U, page 307, of the Conveyance records of Vernon Parish, Louisiana.
16. Defendant attached hereto, as a part of this answer, a certified copy of the patent from the New Orleans Pacific Railway Company, and a certified copy of each of the deeds named and described in the chain of title above set forth, and incorporates them into and makes them a part of this answer.

WHEREFORE, defendant prays: That the Complainant's demand be rejected at its cost and that the defendant, the W. R. Pickering Lumber Company, be quieted in its ownership and possession of the lands described in Complainant's Bill; and that its title thereto be confirmed according to law, and particularly under the Act of Congress of March 2, 1896.

And defendant prays for such other and further relief

in the premises as to this Honorable Court may seem meet
and in accordance with equity.

BLANCHARD, SMITH & PALMER,
J. G. PALMER,
W. W. THOMPSON,
Solicitors for Defendant.
W. R. Pickering Lumber Company.

ENDORSED: No. 947 In Equity.

United States District Court for the Western District of Louisiana. United States of America, Plaintiff, vs. New Orleans Pacific Railway Company, and W. R. Pickering Lumber Company, and Southland Lumber Company, Defendants.

MOTION TO DISMISS and ANSWER
OF W. R. PICKERING LUMBER COM-
PANY. Filed Apr 20 1915, Leroy B. Gu-
lotta, Clerk, U. S. District Court, West.
Dist. of Louisiana.

17 In the District Court of the United States for
the Western District of Louisiana.

No. 947. In Equity.

UNITED STATES OF AMERICA,

Plaintiff

vs.

NEW ORLEANS PACIFIC RAILWAY COMPANY

and

W. R. PICKERING LUMBER COMPANY

and

SOUTHLAND LUMBER COMPANY.

And now comes the Southland Lumber Company, one of the Defendants herein, and appearing separately, moves

the Court to dismiss and reject the bill filed herein, because an Act of Congress approved March 3, 1891, provides that all suits by the United States to vacate and annul any patent issued prior to its passage should be brought within five years from the passage thereof. And an Act of Congress approved March 2, 1896, provides that all suits by the United States, to vacate and annul any patent theretofore issued under any railroad or wagon road land grant, should be brought within five years from the date of the passage of said Act.

And your respondent shows, that as by said bill appears, the patent herein sought to be annulled, was issued prior to the passage of both the said Acts of Congress of the United States; that is to say, on March 3, 1885, as said bill alleges, and the bill herein, being a suit to vacate and annul the said patent, was filed in your Honorable Court on the 21st day of January 1915, and that hence under both the said Acts of Congress, the time within which the Government could have brought this suit to vacate and annul the patent issued to the New Orleans Pacific Railway Company, expired long prior to the filing of this bill in your Honorable Court and to the issuance of the subpoena herein.

Defendant further pleads against the right and propriety of the United States to prosecute its said bill the doctrine of equitable laches and of estoppel, and shows that a period of twenty-nine years has elapsed since the issuance of said patent, during which time, no attack has been made thereon; and in faith whereof, the title to the lands covered thereby, has been transferred and has passed by mesne conveyance into the hands of remote bona fide purchasers: That the United States, complainant, is only a formal party and that the suit is brought in its name to enforce the pretended rights of individuals, and no interest of the Government is involved. And the litigation is being carried on, in behalf of and for the benefit of private parties who claim to have equitable titles or rights in or to the lands by virtue of prior settlements or donations, and

that the effect of a decree, cancelling this patent, would be simply to enable some other parties to perfect any equitable titles which they may have after twenty-nine years has elapsed since the patent was issued, and such individuals are the real parties in interest in this litigation, and the United States Government, complainant, is only a nominal and is not the real party in interest.

18 And this defendant therefore tenders this its motion in limine based upon the prescription and limitation set forth and the equitable laches and estoppel above pleaded, and prays that the same may be separately heard and disposed of before trial of the case, and that upon said hearing, it be sustained and the bill dismissed and rejected at the cost of complainant.

And now reserving the benefit of the above and foregoing pleas of prescription and limitation, laches and estoppel, and only in case same should be overruled, this defendant answers the allegations of Plaintiff's bill as follows

(1)

Defendant admits the allegations of Section One (1) of the Bill; except that it specifically denies that the land involved in this case, viz: The South Half of the Northwest Quarter and the North Half of the Southwest Quarter, Section 3, Township 3 North, Range 7 West, La. Mer. is situated [situated] in Vernon Parish, Louisiana, was illegally and erroneously included in the said patent of the United States to the New Orleans Pacific Railway Company of March 3, 1885; And deny that said patent should be cancelled, in so far as it covers and embraces the Northwest of the Southwest Quarter and South Half of the Northwest Quarter Section 3, Township 3 North, Range 7 West, Louisiana Meridian, the lands claimed by your respondent.

(2)

Defendant admits the allegations of Section Two (2) of the Bill; except as to the confirmation of the Grant, by Act of Congress of February 8th, 1887, and shows that Complainant was completely and irrevocably divested of

title by the Act of Congress March 3, 1871, and by the issuance of the patent of March 3, 1885; and Defendant avers that the Public Land Office was open and in existence at Natchitoches, Louisiana, in whose district and under whose jurisdiction the land was situated; that the said land was surveyed and the lines established, and the hereinafter mentioned Stephen N. Grant, could, and should have filed his homestead application within the delays prescribed by law.

(3)

Defendant admits the allegations of Section Three (3) of the Bill, except, that it specifically denies that the provision of the Second Section of the Act of Congress of February 8, 1887, therein noted, applied to lands at that time patented, which said lands passed under the terms of the Act of March 3, 1871, as above alleged, and because it would divest vested rights and impair obligations of a contract, and therefore violate Articles One, (1) Section Ten, (10) and the Fifth Amendment, of the Constitution of the United States.

(4)

* Defendant admits the allegations of Section Four, (4) of the bill as matters of fact, but denies the legal conclusions that Complainant seeks to draw therefrom.

(5)

Defendant admits the allegations of Section Five of the bill as matters of fact, but specifically denies that this Defendant The Southland Lumber Company, is or can be bound or precluded in any way by said agreement of August 3, 1892, or any of its provisions or clauses, because the New Orleans Pacific Railway Company had prior to that date, sold such land to this Defendant's author in title, John T. Granger as will be hereinafter more clearly set forth.

Defendant denies all and singular, the allegations of Section Six (6) of the Bill, especially in so far as they in any

way affect the Northwest Quarter, of the Southwest Quarter, and the South Half of the Northwest Quarter, of Section 3, Township 3 North, Range 7 West La. Mer: being the lands embraced in this suit, affecting Defendant. And further denies that it was or can in any way, be affected or precluded by any proceedings had in any contest that may have been had by Stephen N. Grant or anyone else, after the 21st day of August, 1886, the date which the New Orleans Pacific Railway Company sold the land to the Defendant's author, John T. Granger. And denies that said Granger, or any of Defendant's authors, or Defendant itself, was made a party to, or affected with notice of the alleged contest or decision of the General Land Office. And further denies that the Officials of the United States Land Office had any right or jurisdiction to entertain any such contest as alleged, and denies the validity of the entire proceedings.

(7)

This Defendant is not sufficiently informed as to the allegations of Paragraph Seven, (7) of the bill, to enable it to answer and therefore denies same, and further answering, avers that for the reasons set forth in the preceding paragraphs of this answer, and particularly in paragraphs five, and six, defendant is not affected or precluded by the matters named in Section Seven, of the bill, because said matters are alleged to have occurred more than five years after the New Orleans Pacific Railway Company had sold the land to Defendant's author, John T. Granger.

(8)

Defendant admits so much of Section 8 of the bill as avers that the said land, viz: The South half of the Northwest Quarter and the North half of the Southwest quarter, Section 3, Township 3 North, Range 7 West La. Mer. is now claimed by the Southland Lumber Company, under mesne conveyances from the said New Orleans Pacific Railway Company, but specifically denies all and singular the remaining allegations of the said Section. And in this connection, this defendant avers that under said mesne

conveyance it has a good, valid and perfect title to said land, and has been in possession thereof and has ranged and paid taxes on same from the year 1886 to date, inclusive.

(9)

Defendant denies all and singular the allegations of Section 9 of the Bill, in so far that it had knowledge and notice of the right and occupancy of the settler, Stephen N. Grant, or anyone else. And further denies that it acquired title subject to such settler's rights and equities.

(10)

Defendant denies that complainant is entitled to the relief prayed for in the prayer to the bill.

(11)

Further answering, Defendant avers that it has owned and possessed the lands in good faith under deed translatable and property duly recorded in the Conveyance Book of Vernon Parish Louisiana, by virtue of the following chain of title, to-wit:

20 South Half of Northwest Quarter, Section 3,
 Township 3 North, Range 7 West, La. Mer.

U. S. Patent, United States to New Orleans Pacific Railway Company, dated March 3, 1885, recorded July 1, 1885, in Book "D" pages 120-131, of Vernon Parish Louisiana.

New Orleans Pacific Railway Company, to John F. Dillon and Henry M. Alexander Trustees, Land Grant & Sinking Fund Mortgage dated April 17, 1883, recorded May 3, 1883, Book "C" pages 50-77. New Orleans Pacific Railway Company to same parties, Supplemental Mortgage, dated Jan. 5, 1884, recorded August 10, 1884 Book "E", pages 390 et seq. Release of both mortgages so far as above and other lands in caption are concerned, recorded Book "D", pages 240-250, and in Book "F", pages 68-70.

New Orleans Pacific Railway Company by E. B. Wheelock, President, and John F. Dillon and Henry M. Alexander, Trustees, under Land Grant & Sinking Fund Mortgage, and Supplemental Mortgage, to JOHN T.

GRANGER, Special Warranty Deed, August 21, 1886, recorded Jan. 31, 1887, Book "D", pages 240-250.

John T. Granger, to Southern Lumber Company; Warranty Deed, dated Dec. 30, 1901, recorded April 4, 1902, in Book "T" pages 476.

Amendment to Articles of Incorporation of Southern Lumber Company of Louisiana, changing its corporate name to Southland Lumber Company, by resolutions of stockholders, dated March 26, 1902, and of Directors on May 1st, 1902, Recorded in Mortgage Record of Vernon Parish, Louisiana. "R", pages 311. Recorded by Secretary of State, June 26, 1902, in Record of Charters No. 20, folio 240. Certificate of Secretary of State recorded in Vernon Parish Mortgage Record, "R", page 435.

Northwest Quarter of Southwest Quarter, of Section 3, Township 3 North, Range 7 West.

United States Patent, U. S. to New Orleans Pacific Railway Company, March 3, 1885, recorded June 1, 1885, in Book "D" pages 127 et seq.

New Orleans Pacific Railway Company, (Mortgages released) to Augustus C. Brown, Quit-claim Deed, dated Jun. 23, 1888, recorded Dec. 18, 1889, in Book "F" pages 9-11.

Permelia A. Brown, (Widow of Augustus C. Brown), William A. Brown, Charles S. Brown, Fred L. Brown, and Hattie L. Gould, (wife of Chas. P. Gould) heirs of Augustus C. Brown, to Isaac Stephenson, Andrew C. Merryman, James I. Scott, Irenus K. Hamilton, Woodman C. Hamilton, and Augustus Spies, a 16/23rds interest in above lands. Warranty Deed, dated July 30, 1890 recorded April 28, 1892 in Book "F", page 467.

Parmelia A. Brown, William A. Brown, Charles S. Brown, Fred L. Brown, Hattie L. Gould, Isaac Stephenson, Andrew C. Merryman James I. Scott, Irenus K. Hamilton, Woodman C. Hamilton, and Augustus Spies, to A. C. Brown Lumber Company. Warranty Deed dated Oct. 7, 1896, recorded June 1, 1899 in Book "L" page 538.

A. C. Brown Lumber Company to SOUTHLAND LUMBER COMPANY; Warranty Deed, dated Feb. 17,

1903, recorded March 14, 1903 in vol. 1 of Conveyances, page 400. Probate proceedings in Estate of Augustus C. Brown filed for record, Aug. 5, 1901, recorded in Vol. "S", page 560 of Conveyances.

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(12)

Further answering, defendant denies that complainant is entitled to any relief by virtue of the Act of Congress of February 8, 1887, because:

(a) The lands here in question were and are not, have never been and can not be held, deemed or considered to be subject to, or in any manner affected by the said Act of February 8, 1887, or by any of the terms, provisions or conditions thereof.

(b) The said land was not possessed as alleged, by actual settlers nor the heirs or assigns of actual settlers under the terms of the said proviso.

(c) Defendant further represents that the New Orleans Pacific Railway Company complied with all the Acts of Congress under which the said lands were obtained, and that the said patent vested in said New Orleans Pacific Railway Company and in its transferees and assigns absolute and indefeasible title to the said land as shown by the recitals of the said patents.

Defendant further shows that the said sales and said transfers above set forth were made in good faith, for a valuable consideration, without notice of any defect in the title and vested complete legal and indefeasible title in the said vendees on the execution and passing of the said Acts of Conveyance, respectively, and that said vendors were each sized in fee thereof; and that during the said ownership as above set forth, each held owned and possessed the lands peaceably as the sole, legal and bona fide owners thereof. That the consideration expressed in said deeds attached hereto and made a part hereof, were bona fide and truly paid and that the vendees in said deeds were without notice of any outstanding claims to said land or defects in said title previous to and down to the time of paying said consideration, and the delivery of said deeds:

and defendant denies that it, or its author in title, had any notice of any settlement, occupancy of, or that any home-
stead pre-emption or other claims had attached to the said land. And further shows that the title to the said lands under the patent issued to the New Orleans Pacific Railway Company has been confirmed, by the Act of Congress of March 3, 1887, March 3, 1891, and of March 2, 1896, the latter of which provides in the first section thereof, that suits to annul any patents to lands heretofore erroneously issued to any railroad or wagon road grant, shall only be brought within five years from the passage of the Act, and to vacate and annul any patents thereafter issued within six years from the date of the issuance of said patent, and the said Section further provides:

“But no patent to any lands held by bona fide purchasers shall be vacated and annulled, but the right and title of such purchaser is hereby confirmed.”

Which said Acts of Congress, and the several provisions thereof, and especially the portion of the Act of March 2, 1896 just above quoted, are pleaded as muniments of title of defendant, specially confirming, if any confirmation is necessary, the title to the lands described by complainant, as bona fide purchasers of same, by virtue of the chain of title as above set forth.

And Defendant further pleads the provisions of the said Acts of Congress, March 3, 1887, March 3, 1891, and March 2, 1896 in bar of this suit, and shows that any right which complainant may have had at any time to institute this suit, has long since prescribed.

22 (d) The awarding and issuance of the aforesaid patent by the United States, through its duly authorized department, was a final and conclusive adjudication by a legally constituted tribunal, charged by law with the duty of determining all the facts legally pre requisite to the issuance of said patent, and said adjudication was final and conclusive and is not open to said attack as is set forth by complainant herein, or at the time hereof.

Defendant attaches hereto, as a part of this answer, a certified copy of the patent from the New Orleans Pacific Railway Company, and a certified copy of each of the deeds named and described in the chain of title above set forth, and incorporate them into and makes them part of this answer.

(13)

This Defendant further alleges that the sales and transfers of the land in question above set forth, were made in good faith and for a valuable consideration, and vested a complete, legal and indefeasible title in the vendee of the New Orleans Pacific Railway Company, and in the various vendees, predecessors in title of this defendant, and alleges that on the execution and passing of the said acts of conveyance respectively, that during the time of ownership of each of the predecessors in title of this defendant, each thereof, held, owned and possessed the said lands peaceably as the sole, legal and bona fide owners thereof; and this defendant alleges that it is a bona fide purchaser of the lands in question, having paid therefor the full, reasonable cash value of said land, at the date of its purchase, and alleges that even if it should be proven that any error or irregularity was made in the issuance of the patent by the Government to the New Orleans Pacific Railway Company, yet such error or irregularity can not be imputed to this defendant, defendant being a bona fide purchaser for value without notice of such error or irregularity and in actual ignorance thereof.

WHEREFORE DEFENDANT PRAYS: That the complainant's demand be rejected at its cost and that the Defendant, the Southland Lumber Company, be quited [quieted] in its ownership and possession of the said land, viz: The Northwest Quarter of the Southwest Quarter, and the South Half of the Northwest Quarter, Section 3. Township 3, North, Range 7 West, La. Mer. Vernon Parish Louisiana, and that its title thereto be confirmed according to law, and particularly under the Act of Congress of March 2, 1896.

And defendant prays for such other and further relief in the premises as to this Honorable Court may seem meet and in accordance with equity.

MONK & O'NEAL
Solicitors for Defendant,
The Southland Lumber Company.

ENDORSED: No. 947 In Equity. United States District Court, for the Western District of Louisiana.

United States of America vs New Orleans Pacific Railway Co. and W. R. Pickering Lumber Co. and Southland Lumber Company.

ANSWER.

Filed Apr. 30, 1915, Leroy B. Gulotta, Clerk, U. S. District Court, West Dist. of Louisiana.

23 In the District Court of the United States,
 for the Western District of Louisiana

No. 947 In Equity.

UNITED STATES OF AMERICA
vs.
NEW ORLEANS PACIFIC RAILWAY COMPANY
and
W. R. PICKERING LUMBER COMPANY, LTD.
and
SOUTHLAND LUMBER COMPANY.

To the Judge of the District Court of the United States for the Western District of Louisiana:

Now comes Stephen N. Grant, a resident of Simpson, Vernon Parish, State of Louisiana, and asks leave of this court to file in the above numbered and entitled cause, this his intervention, and for cause of action states:

1.

That the United States, by Act of Congress approved March 3, 1871, (16 Statutes at Large, 579), granted certain lands therein described to the New Orleans, Baton Rouge & Vicksburg Railroad Company, and thereafter the said New Orleans, Baton Rouge & Vicksburg Railroad Company assigned its rights under the said grant to the New Orleans Pacific Railway Company, a defendant in this cause; that the said assignment of said land grant was ratified and confirmed by Act of Congress approved February 8, 1887 (24 Statutes at Large, 391), as to that portion of the grant not declared forfeited by said last-named act, and the lands granted were to be located in accordance with the maps filed by the said New Orleans Pacific Railway Company in the Department of the Interior of the United States on October 27, 1881, and November 17, 1882, which indicated the definite location of the line of road of said railway company.

2.

Intervenor further states that the rights of actual settlers on said lands at the time of the definite location of the road were preserved to them, both in the original grant, by said Act of March 3, 1871, and by said Act of February 8, 1887, confirming same, such lands, so occupied by settlers at the date of the definite location of said railroad, being, under the terms of both acts, excepted from the grant;

That such exception from the original grant is contained in Section 9 of said Act of March 3, 1871, restricting the lands conveyed to those "where the same shall not have been sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed."

That said exception from the grant in the Act of February 8 1887, confirming same, is contained in the second section in the following words, to-wit:

"That all said lands occupied by actual settlers at the date of the definite location of the said road and still remaining in their possession or in the pos-

session of their heirs or assigns shall be held and deemed excepted from said grant and shall be subject to entry under the public land laws of the United States."

3.

That the third section of the said Act of Congress of February 8, 1887, provided that the confirmation of the grant to the said New Orleans Pacific Railway Company should take effect when said company should accept the provisions of the Act in the manner therein described and agree to discharge all of the duties and obligations imposed upon its assignor by the aforesaid Act of March 3, 1871, which made the original grant to that company, and that the said defendant, New Orleans Pacific Railway Company, thereafter, on April 20, 1887, filed with the Secretary of the Interior of the United States such acceptance and agreed to discharge all the obligations and duties in the Act of Congress referred to.

4.

That the said New Orleans Pacific Raiway Company to facilitate an early adjustment of the land grant, filed in the Department of the Interior of the United States an agreement bearing date of August 3, 1892, the third section of which provides :

"That in the cases where patents have issued to said railway company for lands which have been or may hereafter be adjudged by the Commissioner of the General Land Office to have been in possession of actual settlers at the date of the definite location of said railway company's road, and title is in said railway company, and said trustees agree to make without delay, conveyance thereof to the United States, and where such have been sold by said railway company to third persons, said railway company undertakes to recover title thereto, without delay, and convey the same to said settlers or to the United States; and the said trustees undertake to join in such conveyances and do all acts necessary on their part to enable the railway company to carry out this agreement and stipulation."

5.

Intervenor further states that on the 3rd day of March, 1885, a certain land patent was issued by and in the name of the United States, as grantor granting to said New Orleans Pacific Railway Company as grantee certain lands in Vernon Parish, State of Louisiana, which said patent included among other lands, the following described tracts:

South Half of Northwest Quarter, and North Half of Southwest Quarter, Section 3, in Township 3 North, of Range 7 West, Louisiana Meridian, ($S\frac{1}{2}$ NW $\frac{1}{4}$ & N $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 3, T. 3 N., R. 7 W.).

25 which said tracts of land were, at the time of the filing of the said maps of the definite location of the line of road of the said railway company and at the time of the passage of the Act of Congress of February 8, 1887, aforesaid, occupied by and in the possession of Thos. J. Killen and Stephen N. Grant, respectively, as more fully set forth in Paragraph 7 of this Intervention, actual settlers qualified to enter public lands of the United States under the homestead laws, and who were then and there claiming said land under said laws; and the action of the Land Department of the United States in including said land in the patent which issued to the said railway company as aforesaid, was erroneous and without authority of law.

6.

Intervenor further states that on the day of the said Stephen N. Grant filed an application to enter the said land under the homestead laws of the United States, in the local land office of the United States at Natchitoches in the State of Louisiana; that the New Orleans Pacific Railway Company, the defendant herein, opposed and contested the application of the said Stephen N. Grant, settler, and that said contest, after a hearing had in pursuance of the rules and regulations of the Land Department of the United States, was decided in favor of the said settler and against the said railway company by the Commissioner of the General Land Office [Office] of the

United States on the 26th day of February, 1895, the Commissioner holding that said land was erroneously patented to the said New Orleans Pacific Railway Company, it having been occupied by an actual settler, Thos. J. Killen, at the time of the definite location of the road, and still remaining in the possession of Stephen N. Grant, the said Killen's assignee, improvements, rights and interest in said tract, at the time of the said contest, as shown by docket number

certified copies of which application and all proceedings relating to said contest will be produced on the trial hereof; that the said New Orleans Pacific Railway Company was duly notified by the Commissioner of the General Land Office of his said decision, and was requested to restore the title to said land to the United States and to comply with the conditions of its agreement of August 3, 1892, aforesaid, but the said company failed to restore such land and to comply with the terms of its said agreement.

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7.

Intervenor further states that in 1876 Thomas J. Killen, an actual settler, settled on the land in question and continued to reside thereon until the Spring of 1881, when he sold his improvements to Jack Conley, who immediately took up his residence on the land and continued to live thereon until February of 1886, when he sold his improvements and homestead rights in said land to intervenor, who immediately moved on the place and has continued to reside thereon to this date.

27

8.

Intervenor further states that at the time of the definite location of said line of railway the homestead claim of the said Stephen N. Grant, through the occupancy and possession of his assignor, Thos. J. Killen, had attached to said described land within the meaning of the exception to the original grant contained in Section 9 of the aforesaid

Act of March 3, 1871, and said tract of land was, therefore, excluded from said grant under said act, and said tract was likewise excluded by Section 2 of said confirmatory Act of February 8, 1887.

9.

Intervenor further states that the said New Orleans Pacific Raiway Company, in expressly accepting the terms of said Act of February 8, 1887, as alleged in paragraph 4, and later in agreeing to reconvey to the United States or to actual settlers the lands erroneously patented to it, as alleged in paragraph 4, recognized the fact that said lands, so erroneously patented to it, were held in trust for such actual settlers, their heirs and assigns, and the said New Orleans Pacific Railway Company and its assigns are now estopped from denying that such lands are, in fact, so held in trust for such original settlers, their heirs and assigns.

10.

Intervenor further states that the land hereinabove described is now claimed by W. R. Pickering Lumber Company, Ltd., and Southland Lumber Company, under mesne conveyances from the said New Orleans Pacific Railway Company.

Intervenor further states that neither the New Orleans Pacific Railway Company nor the defendants, W. R. Pickering Lumber Company, Ltd., and Southland Lumber Company, nor any one else claiming any right in and to said land now and by virtue of the patent which issued as aforesaid to the defendant railway company, is entitled, in equity, to maintain any such right, title or interest in and to said land, or any part thereof; that such rights as were acquired under said patent were with full notice and knowledge of the rights and equities of your intevenor [intervenor], as herein set forth.

11.

That intervenor is now ready and has always been ready and willing to pay the defendant, the New Orleans Pacific Railway Company, or to the other defendant, such

sum of money as this court may find was expended by them or either of them in securing from the United States the patent to the land hereinbefore described, and intervenor hereby offers to pay the proportionate amount chargeable against said land as expenses in procuring the patent therefor from the United States, but inasmuch as said land was obtained with other tracts, intervenor is not informed as to the proportionate expenses chargeable therefor, nor can he ascertain the same, for which reason he is unable to pay or bring into court any fixed or definite sum of money, but avers that he is ready and willing to pay into court to the proper defendant whatever amount shall be found to represent the sum expended in securing the patent for the land.

28

12.

WHEREFORE, intervenor prays that he be permitted to intervene in this cause; that the patent heretofore issued to the said New Orleans Pacific Railway Company as aforesaid be declared to be held in trust for your intervenor; that he be adjudged and decreed to be the owner of said land, and that said defendants be decreed to make, execute and deliver to your intervenor the proper deed or deeds conveying all their right, title and interest to the said land, or, in the event of their failure to do so, that the Clerk or some other person duly thereunto appointed by the court make such deed in their stead, and that your intervenor may have such further and other relief as the nature of the cause may require.

DON E. SORELLE
Attorney for Intervenor.

ORDER.

The above and foregoing being considered, it is ordered that Stephen N. Grant be, and he is hereby permitted to file and prosecute his intervention in this cause.

This done and signed at Shreveport, Louisiana, this
13th day of May, 1915.

ALECK BOARMAN
United States Judge.

Filed May 13, 1915,
Leroy B. Gulotta, Clerk,
U. S. District Court,
West Dist. of Louisiana.

ENDORSED: No. 947.

United States District Court, Western District of Louisiana. United States vs. New Orleans Pacific Railway Company and Pickering Lbr. Co. Southland Lbr. Co.

INTERVENTION OF S. N. GRANT.

Filed May 13—1915. Leroy B. Gulotta, Clerk, U. S. District Court, West. Dist. of Louisiana. Recorded in Chancery Order Book, Vol. 4, Folio 180.

29 In the United States District Court,
 Western District of Louisiana.
 Shreveport Division.

No. 947 In Equity

UNITED STATES OF AMERICA,
Plaintiff.

vs.

THE NEW ORLEANS PACIFIC RAILWAY COMPANY
W. R. PICKERING LUMBER COMPANY,
and
SOUTHLAND LUMBER COMPANY,
Defendants.

The Separate Answer of the New Orleans Railway Company to the Intervention of Stephen N. Grant in the above entitled and numbered cause.

To the Judge of the United States District Court, in and
for the Western District of Louisiana:

Now comes The New Orleans Pacific Railway Company, defendant in the intervention of Stephen N. Grant therein, and opposes the allowance of the intervention of the said Stephen N. Grant, therein, for the reason that the same is unnecessary, and the relief sought is the same as in the original bill, and the filing of the intervention is an attempt on the part of the settler claimant alleged in the original bill to supply the interest and authority and establish the duty and right of the Government to prosecute this suit at all, the lack of which interest, authority, right and propriety has been questioned by special pleas filed in the original suit, and for these reasons and for the additional reason that this intervention, illegal, unauthorized, improper and not warranted by the facts, the pleadings, the practice nor the law. Therefore, this defendant objects to the filing and allowance of the same, and prays that the Honorable Court reject the same at the cost of the said intervenor.

And this defendant moves the Court to reject the intervention herein by Stephen N. Grant, if the same should be allowed and considered, and in that event only,
 30 because the Act of Congress of March 3, 1887,
 (24 Stat. L., Ch. 376); March 3, 1891, (26 Stat. L.
 1093); and March 2, 1896, (29 Stat. L. 42, ch. 39), ordained and established a time limited to five years as to previously issued patents, and six years as to subsequently issued patents within which all suits by the United States to vacate and annul any patent erroneously issued under any railroad or wagon road land grant, should be brought. And, this defendant shows as by the original bill in the said intervention appears, that the patent herein sought to be annulled was issued prior to all of said acts aforesaid, and since the said issuance of the same there has elapsed more than the statutory time allowed for attacks thereon, and that the purported equitable claims of this intervenor to the said land are not within the meaning or protection of any laws, juris-

prudence or acts of Congress, and do not in any way interrupt or affect the run of said prescription, limitation and confirmation established by said Acts, which prescription, limitation and confirmation is hereby specially pleaded, not only in bar of the action and this intervention, but affirmatively as a defense thereto by this defendant and its assigns.

Defendant further pleads against the right and propriety of the United States to prosecute its said bill, or of this intervenor to prosecute said intervention, the doctrine of laches and equitable estoppel, and shows that the period of thirty years has elapsed since the issuance of the said patent, during which time no attack has been made thereon, and in faith whereof the title to the land covered thereby has been transferred and has passed by mesne conveyances into the hands of remote and bona fide purchasers, and in reliance thereon one of the chief industries of the State of Louisiana has been built, which would be utterly destroyed by successful issue of these attacks by the Government and these intervenors upon the title of this defendant company who has a direct interest in regard to the same on account of the Acts of Congress aforesaid.

This defendant, therefore, tenders its motion in limine based on the description and limitation and confirmation

above set forth and the equitable laches and estoppel above pleaded, and prays that the same may be 31 separately heard and disposed of before the trial on the merits of this cause, and upon the said hearing these pleas be sustained and the bill and intervention be dismissed and rejected at the cost of the plaintiff and the intervenor.

And now, reserving the benefit of the above and foregoing pleas of prescription, laches and estoppel, and only in case the same should be overruled, this defendant answers the allegations of the intervention as follows:

1.

This defendant admits the allegation of the first clause of the first section of intervenor's petition, relative to the original grant by Congress to the New Orleans, Baton Rouge

& Vicksburg Railroad Company and the assignment by said company of its rights under the grant of this defendant.

This defendant also admits the existence of the Act of Congress of February 8, 1887 (24 Stat. L. 391) as an historical fact and law existing on the statute books, but denies each and every allegation of the said section of plaintiff's bill, and each and every inference deduction or conclusion sought to be drawn upon said Act in said first section of the intervention, and especially denies that "the lands granted" were to be located in accordance with the maps filed by the New Orleans Pacific Railway Company in the Department of the Interior as alleged, and denies especially that said maps indicated the definite location of the said railroad in the sense, tenor and effect alleged and inferred in the said section of the said intervention.

2.

Defendant admits the existence of the sections of the Acts of Congress quoted in Section 2 of the Intervention, but denies each and every deduction, inference and conclusion intervenor seeks to draw therefrom, and especially denies that the rights of intervenor were preserved or protected as he alleged.

3.

Defendant admits the allegation of the third section of intervenor's petition as an historical fact and as such only.

4.

Defendant admits the allegation of the fourth section of intervenor's petition as an historical fact and as such only.

5.

Defendant admits the issuance of the patent as alleged in the fifth section of the intervention as an historical fact, but denies each and every allegation of said section and each and every inference, deduction or conclusion sought to be drawn therefrom, and especially denies the occupancy and possession of the land as alleged, and the error and unauthorized action of the Land Department as alleged.

6.

Defendant is without sufficient information to enable it to affirm or deny the allegations of the sixth paragraph of plaintiff's bill, and, therefore, for the purpose of requiring strict and legal proof of the same on the trial hereof, denies each and every allegation therein contained, and each and every inference, deduction or conclusion sought to be drawn therefrom.

7.

Defendant denies each and every allegation of the seventh paragraph of the intervenor's petition and each and every inference, deduction or conclusion sought to be drawn therefrom, and on trial hereof will require strict and legal proof of the same.

8.

Defendant denies each and every allegation of fact contained in the eighth section of the intervenor's bill, and denies each and every inference, deduction or conclusion either of law or of fact to be sought drawn therefrom, and especially denies that the claim of Stephen N. Grant to the said land, if attached to the land within the meaning of any Act of Congress, and denies expressly that the land was in any sense excluded from the grant for any reason whatsoever.

9.

Defendant avers that the allegations of the ninth section of intervenor's bill are conclusions of law and not proper allegations, and, therefore, it is not called to plead in regard to the same; but, in so far as it should so plead, it denies each and every phase and portion of the same.

33

10.

This defendant is not advised as to the present owner of the said land, but for the purpose of requiring strict and legal proof of the same, denies the first paragraph of the tenth section of the intervenor's bill. The second paragraph of the same being an allegation of a legal conclusion, this defendant does not feel that it is required to plead to the

same; but, in so far as it so require, it denies each and every phase and portion thereof. It specially denies notice or knowledge such as alleged therein.

11.

Defendant denies each and every allegation of the eleventh section of intervenor's petition and each and every inference, deduction or conclusion sought to be drawn therefrom.

12.

Defendant denies that intervenor is entitled to the relief sought in the prayer of his petition. Especially denies that his intervention should be received or allowed. Avers that if it is considered, it should be dismissed upon the pleas herein plead in limine, and if considered on the merits the prayer of his petition should be disallowed, and that the title of this defendant and its assigns should be quieted and confirmed.

13.

Further answering, this defendant shows that the intervenor is not entitled to the relief sought by virtue of the Act of February 8, 1887, or any other Act or law, because:

(a) The lands here in question were and are not, have never been and cannot be held, deemed or considered to be or to have been subject to or in any manner affected by the said Act of Feb. 8, 1887, or any of its terms, provisions or conditions as is contended for by the plaintiff, but that its title thereto vested under and by virtue of and rests upon previously existing laws, to wit: the act of March 3, 1871.

(b) The said land was not possessed by actual settlers or the heirs or assigns of such actual settlers under the terms of the said proviso of section two
34 of the said act of Feb. 8, 1887.

(c) The said Act of Feb. 8, 1887, does not in any manner apply to lands lying within the indemnity limits of said grant.

(d) The said Act of Feb. 8, 1887, does not apply to lands which were patented previously thereto except to

confirm the titles to such lands and to permit the operation of the so-called "Blanchard-Robinson Agreement" as to such lands under the terms and provions of the said Act.

(e) Defendant further shows that it complied with all of the Acts of Congress under which the said lands were obtained, and that the title which vested in it thereby was absolute and indefeasible, as evidenced by the said patents.

(f) Defendant shows that the prescription, limitation and confirmation established by the Acts of Congress plead in defendant's exception and motion in limine No. C supra, operates as a rule of property and confirms and establishes property rights in this defendant and its transferees and as such said Acts are hereby set forth and affirmatively plead.

(g) Defendant avers that the construction of Act of Congress of Feb. 8, 1887, which is urged by the plaintiffs, would render the Act unconstitutional, null and void, as divesting vested rights, impairing the obligations of contracts, taking property without due process of law, and denying the equal protection of the laws, all in violation of and
35 contrary to the provisions, in letter and spirit, of section ten of article one and the fifth amendment to the constitution of the United States, which unconstitutionality is hereby especially urged and plead.

(h) Defendant shows that there was at and prior to the passage of the Act of March 8, 1871, an United States District land office open and existing at Natchitoches, within whose jurisdiction the lands here in question were located, and that these said land had been surveyed and the lines established by an official United States survey and well known generally and available and that there was nothing to prevent any claimant from taking any and all steps necessary and prerequisite under the public land laws to initiate his claim thereto, to file any homestead application and pre-emption claim or assert any right or claim which he might have under the laws for the disposition of the public domain, which action defendant alleges these settlers should

have taken and not taking preserved no rights as against the Government or its grantees and having obtained none under any subsequent Acts of Congress or otherwise cannot now be heard to question the legal title.

Wherefore, this defendant prays, as it prayed above, that this intervention be denied and not allowed, but that if considered that the motions in limine plead first above be so heard and sustained, and defendant further prays that after trial hereof, in case such a trial be had, that the answer and the affirmative defenses herein set up be held and deemed good in law and in equity, and that a decree be entered herein confirming and quieting the patent issued to this defendant, New Orleans Pacific Railroad Company, for its own benefit and for the use and benefit of its assigns and transferees, and rejecting and dismissing at its own cost

the petition and demands of the plaintiff's herein.

36 Defendant further prays, for all equitable and general relief in the premises as is just and proper to this Honorable Court seems meet.

HUDSON, POTTS, BERNSTEIN & SHOLARS
Attorneys for the N. O. Pac. R. R. Co.

ENDORSED: No. 947 In Equity. United States District Court, Western District of Louisiana. Shreveport Division. United States of America, Plaintiff versus The New Orleans Pacific Ry. Co. and W. R. Pickering Lbr. Co. and Southland Lbr. Co. Defendants. INTERVENTION OF STEPHEN N. GRANT. ANSWER OF THE NEW ORLEANS PACIFIC RAILWAY COMPANY to Intervention of STEPHEN N. GRANT. Filed as of Aug. 4, 1915, Leroy B. Gulotta, Clerk U. S. District Court, West Dist. of Louisiana.

37 In the District Court of the United States
 For the Western District of Louisiana.

UNITED STATES OF AMERICA,

Plaintiff,

vs. No. 947. In Equity.

NEW ORLEANS PACIFIC RAILWAY COMPANY,

and

W. R. PICKERING LUMBER COMPANY,

and

SOUTHLAND LUMBER COMPANY,

Defendants.

And now comes the W. R. Pickering Lumber Company, one of the defendants herein, and appearing separately, moves the Court to dismiss and reject the intervention filed herein by Stephen N. Grant, because an Act of Congress, approved March 3, 1891, provides that all suits by the United States to vacate and annul any patent issued prior to its passage, should be brought within five years from the passage thereof, and an Act of Congress approved March 2, 1896, provides that all suits by the United States to vacate and annul any patent theretofore issued under any railroad or wagon road land grants should be brought within five years from the date of the passage of the said act.

And your respondent shows that, as by the original bill and the said intervention, the patent herein sought to be annulled was issued prior to both of said acts of Congress of the United States, that is to say, on March 3, 1885, and this being a suit to vacate and annul the said patent, the original bill was filed in your Honorable Court on the 21st day of January, 1915, and this intervention subsequent thereto; and that hence under both the said Acts of Congress, the time within which the Government should have brought this suit to vacate and annul the patent issued to the New Orleans Pacific Railway Company, and the time within which this intervention could be brought, either as an intervention or as a direct action, expired long prior to

the filing of this bill, or of this intervention in your Honorable Court, and to the issuance of the subpoena herein.

Defendant further pleads against the right and propriety of the United States to prosecute its said bill, or of the intervenor to prosecute the said intervention, the doctrine of equitable laches, and of estoppel, and shows that the period of thirty years has elapsed since the issuance of the said patent, during which time no attack has been made thereon and in faith thereof the title to the land covered thereby has been transferred by mesne conveyances into the hands of remote bona fide purchasers.

And this defendant therefore tenders this, its motion in limine, based on prescription and limitation above set forth, and the equitable laches and estoppel above pleaded, and prays that same may be separately heard and disposed of before the trial of the case, and that upon the said hearing it be sustained, and the bill and intervention dismissed and rejected at the costs of the complainant and intervenor.

And now, reserving the benefit of the above and foregoing pleas of prescription, limitation, laches and estoppel, and only in case same should be overruled, this defendant answers the allegations of the intervention as follows:

38

1.

Defendant admits the allegations of Sec. 1 of the intervention.

2.

Defendant denies the general statements of law contained in Section 2 of the intervention, and denies that intervenor is entitled to claim any right or benefit by virtue of the same.

3.

Defendant admits the general statements of law contained in Section 3 of the intervention, but denies that intervenor is entitled to claim any right or benefit by virtue of the same.

4.

Defendant admits the allegations of Section 4 of the

intervention as matters of fact, but specifically denies that this defendant, W. R. Pickering Lumber Company, is, or can be, bound or precluded in any manner by the said agreement of August 3, 1892, or any of its provisions or clauses, because the New Orleans Pacific Railway Company had prior to that date sold the said land to this defendant's authors in title, as fully shown in the answer to the original bill filed by the defendant herein.

5.

Defendant admits the allegations of Section 5 of the intervention, except that defendant denies that the land in question was occupied by and in possession of Thomas J. Killen, and Stephen N. Grant, or that the said Thomas J. Killen or Stephen N. Grant was an actual settler, and qualified to enter public land of the United States under the homestead laws, or that he was then and there claiming the said land under the homestead laws, and denies the action of the Land Department of the United States in including the said land in the patent which issued to the said Railway Company was erroneous or without authority in law, and shows that the United States Government was completely and irrevocably divested of title by the Act of Congress of March 3, 1871, and by the issuance of patent on March 3, 1885, and avers that the Public Land Office was open and in existence at Natchitoches, Louisiana, in whose district and under whose jurisdiction the said land was situated; that the said land was surveyed and lines established, and that the said Stephen N. Grant, if he had been entitled to or had desired to do so, could and should have filed his homestead application within the delays prescribed by law; and defendant denies that the provisions of the second section of the Act of Congress of February 8, 1887, apply to lands at this time patented, which lands passed under the terms of the Act of March 3, 1871, as above alleged; and because it would divest vested rights and impair obligations of a contract, and therefore violated Article One of Section Ten, and the Fifth Amendment of the Constitution of the United States.

6.

Defendant denies all and singular the allegations of Section Six of the intervention, especially in so far as they in any way affect the land embraced in this suit.

7.

Defendant denies, all and singular, the allegations of Section 7 of the intervention.

8.

Defendant denies, all and singular, the allegations of Section 8 of the intervention.

9.

Defendant denies, all and singular, the allegations of Section 9 of the intervention, and again avers that
39 any acceptance made by the New Orleans Pacific Railway Company, or any agreement to recover and convey to the United States or to actual settlers, made after the date on which the New Orleans Pacific Railway Company sold said land to Smith H. Mallory on April 1st. 1889, could or did in any way bind or preclude the said Smith H. Mallory or any of his successors in title.

10.

Defendant admits so much of Section 10 of the Intervention as avers that the land in question in this suit is now claimed by the W. R. Pickering Lumber Company under mesne conveyances from the said New Orleans Pacific Railway Company, but specifically denies all and singular the remaining allegations of the said second section.

And in this connection, this defendant avers that under the mesne conveyances, it has a good, valid, and perfect title to the said land, and has been in possession thereof, has ranged and paid taxes on same for the year — to date inclusive.

11.

Defendant is not sufficiently informed as to the allegations of paragraph eleven of the intervention to enable it to answer, and therefore denies same.

12.

Defendant avers that it has owned and possessed the land in good faith under deeds translative of property, duly recorded in the Conveyance Books of Vernon Parish, Louisiana, by virtue of the following chain of title, viz:

- 40 NORTHWEST QUARTER OF SOUTHWEST
 QUARTER, SECTION THREE, TOWNSHIP
 THREE, NORTH, RANGE SEVEN WEST.
1. From U. S. entrys selections November 8, 1883, by N. O. P. Ry. Co., per approved list No. 2.
 2. Patent United States to New Orleans Pacific Railway Co., dated March 3, 1885, recorded Book D, page 120, date of recording not shown in abstract.
 3. New Orleans Pacific Railway Company to John M. Dillon and Henry M. Alexander, Trustees, mortgage dated April 17, 1883, recorded May 3, 1883, in Book C of mortgages, page 50.
 4. New Orleans Pacific Railway Company by E. B. Wheelock, President, and Wm. L. Nicholson, Secretary, to John M. Dillon, and Henry M. Alexander, Trustees, mortgage dated April 17, 1883, and filed August 7, 1897, recorded in Book E of mortgages, page 366.
 5. New Orleans Pacific Railway Company by E. B. Wheelock, President, and William L. Nicholson, Secretary, to John M. Dillon, and Henry M. Alexander, Trustees, mortgage dated January 5, 1884, filed August 10, 1897, recorded Book E of mortgages, page 390.
 6. New Orleans Pacific Railway Company by E. B. Wheelock, President, and Robert Strong, Secretary, and John M. Dillon and Henry M. Alexander, Trustees, to Smith H. Mallory, deed dated April 1st, 1889, filed December 9, 1889, recorded Book D, page 566.
 7. S. H. Mallory and Annie L. Mallory, his wife, to Joseph Fisher, warranty deed dated April 16, 1898, filed May 15, 1898, recorded Book L, page 96.

8. Contract between Joseph Fisher and C. S. Searing dated December 24, 1897, filed December 28, 1899, recorded Book E of mortgages, page 607.
9. Succession of Joseph Fisher, Probate No. 311, heirs Joseph Fisher a major and Statie Fisher a girl minor, inventory April 20, 1900, extract of inventory Book E of mortgages, page 694. Minors mortgage cancelled February 16, 1905, by authority duly received in Book EE of mortgages, page 137.
10. C. S. Searing and Fannie S. Searing hiw wife, to Statie M. Fisher, quit claim dated May 24, 1901, filed July 8, 1901, recorded Book P, page 602.
11. C. S. Searing to Statie M. Fisher, receipt dated June 8, 1901, filed July 8, 1901, recorded Book P, page 605.
12. C. S. Searing to Statie M. Fisher, receipt dated January 28, 1901, recorded July 8, 1901, Book R. of mortgages, page 95.
13. Statie M. Fisher et al. to W. R. Pickering Lumber Company, warranty deed dated 15 day of August, 1902, filed 26th day of August, 1902, and recorded in Book U, page 307, of the Conveyance records of Vernon Parish, Louisiana.

41 Defendant refers to and adopts the patent to the New Orleans Pacific Railway Company, and a certified copy of each of the deeds named and described in the chain of title above set forth, attached to and incorporated into the answer of the original bill.

13.

Further answering defendant denies that intervenor is entitled to any relief by virtue of the Act of Congress of February 8, 1887, because:

(1) The lands here in question were and are not, have never been and cannot be held, deemed or considered, to be subject to or in any manner affected by the said Act of

February 8, 1887, or by any of the terms provisions, or conditions thereof.

(2) The said land was not possessed as alleged by actual settlers nor the heirs or assigns of actual settlers under the terms of the said proviso.

(3) The property involved in this suit was selected by the New Orleans Pacific Railway Company as indemnity land under the terms of the Act of Congress, March 3, 1871, whereas the proviso of Section Two of the Act of February 8, 1887, applies only to granted or placed land and not to lieu or indemnity lands.

(4) Defendant further represents that the New Orleans Pacific Railway Company complied with all the acts of Congress under which the said lands were obtained, and that the said patents vested in said New Orleans Pacific Railway Company and in its transferees and assigns absolute and indefeasible title to the said land, as shown by the recitals of the said patents, the said lands having been duly selected from the indemnity limits of the said grant and the said selections having been duly approved.

(5) Defendant further shows that the said sales and said transfers above set forth were made in good faith and for a valuable consideration without notice of any defect in the title and vested complete and legal and indefeasible title in the said vendees on the execution and passing of the said Acts of Conveyance respectively, and that said vendors were each seized in fee thereof; and that during the said ownership as above set forth, each held, owned and possessed the lands peaceably as the sole, legal, and bona fide owners thereof; that the consideration expressed in said deeds attached hereto and made a part hereof were bona fide and truly paid, and that the vendees in said deeds were without notice of any outstanding claims to said land or defects in said title previous to and down to the time of paying said consideration and the delivery of said deeds; and defendant denies that it or its authors in title had any notice of any settlement, occupancy of, or that any homestead, pre-emption, or

other claims had attached to the land. And further shows that the titles to the said lands under the patent issued to the New Orleans Pacific Railway Company has been confirmed by he Acts of Congress of March 3, 1887, March 3, 1891, and of March 2, 1896, the latter of which provides in the first section thereof, that suits to annul any patents to lands heretofore erroneously issued to any railroad or wagon road grant, shall only be brought within five years from the passage of the Act and to vacate and annul any patents thereafter issued within six years from the date of the issuance of said patent, and the said Section further provides:

"But no patent to any lands held by bona fide purchasers shall be vacated and annulled, but the right and title to such purchaser is hereby confirmed."

42 Which said Acts of Congress, and the several provisions thereof, and especially the portion of the Act of March 2, 1896, just above quoted, are pleaded as muniments of title of defendant, specially confirming, if any confirmation is necessary, the title to the land described by intervenor, as bona fide purchasers of same by virtue of the chain of title as above set forth.

And defendant further pleads the provisions of the said Acts of Congress, March 3, 1887, March 3, 1891, and March 2, 1896, in bar of this suit, and shows that any right which intervenor may have had at any time to institute this suit, has long since prescribed.

(6) The awarding and issuance of the aforesaid patent by the United States, through its duly authorized department, was a final and conclusive adjudication by a legally constituted tribunal, charged by law with the duty of determining all the facts legally prerequisite to the issuance of said patent, and said adjudication was final and conclusive and is not open to said attack, as is set forth by intervenor herein, or at the time hereof.

(7) This defendant further alleges that the sales and transfers of the land in question above set forth, were made

in good faith, and for a valuable consideration, and vested a complete, legal and indefeasible title in the vendee of the New Orleans Pacific Railway Company, and in the various vendees, predecessors in title of this defendant, and alleges that on the execution and passing of the said acts of conveyance respectively, that during the time of ownership of each of the predecessors in title of this defendant, each thereof held, owned, and possessed the said lands peaceably as the sole, legal and bona fide owners thereof; and this defendant alleges that it is a bona fide purchaser of the lands in question, having paid therefor the full, reasonable cash value of said land, at the date of its purchase, and alleges that even if it should be proven that any error or irregularity was made in the issuance of the patent by the Government to the New Orleans Pacific Railway Company, yet such error or irregularity cannot be imputed to this defendant, defendant being a purchaser for value without notice of such error or irregularity and in actual ignorance thereof.

14.

Defendant adopts and makes part of this answer to the intervention all and singular the pleas and answer herein-before filed to the original bill.

Wherefore defendant prays: That intervenor's demands be rejected at his costs and that the defendant, the W. R. Pickering Lumber Company, be quieted in its ownership and possession of the said land described in this intervention, and that its title thereto be confirmed according to law, and particularly under the Act of Congress of March 2, 1896.

And defendant adopts the prayer of the answer of the original bill, and prays for such other and further relief in the premises, as to this Honorable Court may seem meet and in accordance with equity.

BLANCHARD, SMITH & PALMER

J. G. PALMER

W. W. THOMPSON

Solicitors for Defendant,
W. R. Pickering Lumber Company.

ENDORSED: No. 947 In Equity. United States District Court for the Western District of Louisiana. United States of America Plaintiff-vs-New Orleans Pacific Railway Company and W. R. Pickering Lumber Company, and Southland Lumber Company, Defendants. MOTION TO DISMISS and ANSWER TO INTERVENTION on behalf of defendant, W. R. Pickering Lumber Co. Filed May 13, 1915, Leroy B. Gulotta, Clerk, U. S. District Court, West Dist. of Louisiana.

- 43 In the District Court of the United States
 for the Western District of Louisiana.

UNITED STATES OF AMERICA,
 Plaintiff,
 vs. No. 947 In Equity.
NEW ORLEANS PACIFIC RAILWAY CO.
 and
SOUTHLAND LBR. CO. ET ALS,
 Defendants.

Now comes the Southland Lumber Company, one of the defendants herein, and appearing separately, moves the Court to dismiss and reject the intervention filed herein by Stenen N. Grant, because an Act of Congress approved March the 3rd. 1891, provides that all suits by the United States to vacate and annul any patent issued prior to it's passage should be brought within FIVE years from the passage thereof, and an Act of Congress approved March 2nd, 1896 provides that all suits by the United States to vacate and annul any patent heretofore issued under any railroad or wagon road Land Grant should be brought within FIVE YEARS from the date of the passage of said Act.

And your respondent shows that, as by the original bill and the said intervention appears, that patent herein sought to be annulled was issued prior to both of said Acts of the Congress of the United States, that is to say, on

March 3rd, 1885, and this being a suit to annul and vacate the said patent, the original bill was filed in your Honorable Court on the 21st day of January, 1915, and this intervention was filed in your Honorable Court on May 13, 1915, and that hence under both the said Acts, of Congress, the time within which the Government should have brought this suit to vacate and annul the patent issued to the New Orleans Pacific Railway Company, and the time within which this intervention should be brought, either as an intervention or as a direct action, expired long prior to the filing of this bill, or of this intervention in your Honorable Court, and to the issue of the subpoena herein.

Defendant further pleads against the right and propriety of the United States to prosecute it's said bill, or of the intervenors to prosecute the said intervention, the doctrine of equitable laches, and of estoppel, and shows that the period of THIRTY years has elapsed since the issuance of the said patent, during which time no attack has been made thereon and in faith thereof, the title to the land covered thereby has been transferred and has passed by mesne conveyances into the hands of remote bona fide purchasers.

And this defendant, therefore, tenders this, it's motion in limine bassed on prescription and limitation above set forth, and the equitable laches and estoppel above pleaded, and prays that same may be separately heard and disposed of before the trial of the case, and that upon the said hearing it be sustained, and the bills of intervention dismissed and rejected at the costs of the complainant and Intervenor.

And now reserving the benefit of the above and foregoing pleas of prescription, limitations, laches and estoppel, and only in case same should be overruled, this Defendant answers the allegations of the intervention as follows:

1.

Defendant admits the allegations of Section One of the Intervention.

2.

Defendant admits the general statements of law contained in Section Two of the intervention, but denies that

intervenor is entitled to claim any right or benefit by virtue of the same.

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3.

Defendant admits the general statements of law contained in Section Three of the intervention, but denies that intervenor is entitled to claim any right or benefit by virtue of the same.

4.

Defendant admits the allegations of Section Four of the intervention as matters of facts, but specially denies that this defendant, Southland Lumber Company, is, or can be, bound or precluded in any way by the said agreement of August the 3rd, 1892, or any of it's provisions or clauses, because the New Orleans Pacific Railway Company had prior to that date, sold the said land to this Defendant's authors, to-wit:

South Half ($S\frac{1}{2}$) of Northwest Quarter (NW $\frac{1}{4}$) Section Three (3) Township Three (3) North of Range Seven (7) West to John T. Granger, on August 21, 1896, and the Northwest Quarter (NW $\frac{1}{4}$) of Southwest Quarter (SW $\frac{1}{4}$) Section Three Township Three (3) North of Range Seven (7) West, to Augustus C. Brown, on June 23, 1888, and defendant's authors, as is fully shown in answer to the original bill filed by defendant herein.

5.

Defendant admits the allegations of Section Five of the Intervention, in so far as it affects Defendant's interest except that Defendant denies that the South Half ($S\frac{1}{2}$) of Northwest (NW $\frac{1}{4}$) and Northwest Quarter (NW $\frac{1}{4}$) of Southwest Quarter (SW $\frac{1}{4}$) Section Three (3) Township Three (3) North of Range Seven (7) West, being a part of the land in question, was occupied by and in possession of Steven N. Grant, or that the said Steven N. Grant, or his Author, was an actual settler qualified to enter public land, of the United States under the Homestead Laws, or that he was then and there claiming the said land under Home-

stead Laws, and denies the action of the Land Department of the United States in including the said land in the patent which issued to the Railway Company, was erroneous or without authority in law, and shows that the United States Government was completely and irrevocably divested of title by the Act of Congress of March 3rd. 1871, and by issuance of patent on March 3rd. 1885, and avers that the public Land Office was open and in existence at Natchitoches, Louisiana, in whose district and under whose jurisdiction the said land was situated; that the said land was surveyed and lines established, and that the said Steven N. Grant, if he had been entitled or had desired to do so, could and should have filed his homestead application within the delays prescribed by law; and defendant denies that the provisions of the second section of the Act of Congress, of Feb. the 8th, 1887, apply to lands at this time patented, which land passed under the terms of the Act of March 2nd, 1871, as above alleged; and because it would divest vested rights and impair obligations of a contract and therefore violate Article One of Section Ten, and the Fifth Amendment of the Constitution of the United States.

6.

Defendant denies all and singular the allegations of Section Six of the intervention, especially in so far as they in any way affect the South Half ($S\frac{1}{2}$) of Northwest Quarter ($NW\frac{1}{4}$) and Northwest Quarter ($NW\frac{1}{4}$) of Southwest Quarter ($SW\frac{1}{4}$) Section Three (3) Township Three (3) North of Range Seven (7) West, being the land embraced in this suit, claimed by respondent, and further denies that it was, or can, in any way be affected or precluded by any proceedings had in any contract by Steven N. Grant, said Grant having applied to enter said land on or about &— day of Feb. 1901, or anyone else, after August 21st, 1886, and June 23rd, 1888 respectively, the date on which the New Orleans Pacific Railway Company sold the lands to the defendant's authors, John T. Granger and Augustus C. Brown, and denies that said John T. Granger or Augustus C. Brown, or any of defendant's intervening authors, or

defendant itself, was the party to, or affected with, notice of the alleged contest or decision of the General Land Office and further denies that the officials of the United States Land Office, had any right or jurisdiction to entertain any such contest as alleged, and denies the validity of the entire proceedings.

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7.

Defendant denies all and singular, the allegations of Section Seven of the intervention.

8.

Defendant denies all and singular the allegations of Section Eight of the intervention.

9.

Defendant denies all and singular the allegations of Section Nine of the intervention, and again avers that any acceptance made by the New Orleans Pacific Railway Company, or any agreement to recover and reconvey to the United States, or to actual settlers, made after the date on which the New Orleans Pacific Railway Company sold the said lands to respondent author, could or did, in any way bind or preclude John T. Granger or Augustus C. Brown, or any of their successors in title.

10.

Defendant admits so much of the Section Ten of the intervention, as avers that a part of the land in question, in this suit, that is South Half ($S\frac{1}{2}$) of Northwest Quarter ($NW\frac{1}{4}$) and Northwest Quarter ($NW\frac{1}{4}$) of Southwest Quarter ($SW\frac{1}{4}$), Section Three (3) Township Three (3) North of Range Seven (7) West, is now claimed by the Southland Lumber Company under mesne conveyance from the said New Orleans Pacific Railway Company, but specially denies, all and singular the remaining allegations of the said Section. And, in this connection, this defendant avers that under the said mesne conveyance, it has a good valid and perfect title to the said land and has been in possession thereof; has arranged and paid taxes on the same

through itself and Authors since the year 1885 to date inclusive.

11.

Defendant is not sufficiently informed as to the allegations of Paragraph Eleven of the intervention to enable it to answer, and therefore denies same.

12.

Defendant avers that it has owned and possessed the land in good faith under the deeds translative of property, duly recorded in the conveyance books of Vernon Parish, Louisiana, by virtue of the following chain of title to-wit:

46 South Half of Northwest Quarter (S $\frac{1}{2}$ NW)-Sec.
3-3-7 West, 79.46 acres.

U. S. Patent, United States to New Orleans Pacific Railway Company, dated March 3, 1885, recorded July 1, 1885, in Book "D" pages 120-131, of Vernon Parish Louisiana.

New Orleans Pacific Railway Company, to John F. Dillon and Henry M. Alexander Trustees, Land Grant & Sinking Fund Mortgage dated April 17, 1883, recorded May 3, 1883, Book "C" pages 50-77. New Orleans Pacific Railway Company to same parties, Supplemental Mortgage, dated Jan. 5, 1884, recorded August 10, 1884 Book "E," pages 390 et seq. Release of both mortgages so far as above and other lands in caption are concerned, recorded Book "D," pages 240-250, and in Book "F," pages 68-70.

New Orleans Pacific Railway Company by E. B. Wheellock, President, and John F. Dillon and Henry M. Alexander, Trustees, under Land Grant & Sinking Fund Mortgage, and Supplemental Mortgage, to JOHN T. GRANGER, Special Warranty Deed, August 21, 1886, recorded Jan. 31, 1887, Book "D," pages 240-250.

John T. Granger, to Southern Lumber Company; Warranty Deed, dated Dec. 30, 1901, recorded April 4, 1902, in Book "T" pages 476.

Amendment to Articles of Incorporation of Southern Lumber Company of Louisiana, changing its corporate name to Southland Lumber Company, by resolutions of stockholders, dated March 26, 1902, and of Directors on May 1st, 1902, Recorded in Mortgage Record of Vernon Parish, Louisiana, "R," pages 311. Recorded by Secretary of State, June 26, 1902, in Record of Charters No. 20, folio 240. Certificate of Secretary of State recorded in Vernon Parish Mortgage Record, "R" page 435.

Northwest Quarter of Southwest Quarter, (NW $\frac{1}{4}$ of SW $\frac{1}{4}$) of Section 3-3-7-W, 39.63 acres.

United States Patent, U. S. to New Orleans Pacific Railway Company, March 3, 1885, recorded June 1, 1885, in Book "D" pages 127 et seq.

New Orleans Pacific Railway Company, (Mortgages released) to Augustus C. Brown, Quit-claim Deed, dated Jun. 23, 1888, recorded Dec. 18, 1889, in Book "F" pages 9-11.

Permelia A. Brown, (Widow of Augustus C. Brown), William A. Brown, Charles S. Brown, Fred L. Brown, and Hattie L. Gould, (wife of Chas. P. Gould) heirs of Augustus C. Brown, to Isaac Stephenson, Andrew C. Merryman, James I. Scott, Irenus K. Hamilton, Woodman C. Hamilton, and Augustus Spies, a 16/23rds interest in above lands. Warranty Deed, dated July 30, 1890 recorded April 28, 1892 in Book "F," page 467.

Permelia A. Brown, William A. Brown Charles S. Brown, Fred L. Brown, Hattie L. Gould, Isaac Stepheson, Andrew C. Merryman James I. Scott, Irenus K. Hamilton, Woodman C. Hamilton, and Augustus Spies, to A. C. Brown Lumber Company. Warranty Deed dated Oct. 7, 1896, recorded June 1, 1899 in Book "L" page 538.

A. C. Brown Lumber Company to SOUTHLAND LUMBER COMPANY. Warranty Deed, dated Feb. 17, 1903, recorded March 14, 1903 in Vol. 1 of Conveyances, page 400. Probate proceedings in Estate of Augustus C. Brown filed for record, Aug. 5, 1901, recorded in Vol. "S," page 560 of Conveyances.

Further answering, defendant denies that intervenors are entitled to any relief by virtue of the Act of Congress of February 8, 1887, because:

(a) The lands here in question were and are not, have never been and can not be held, deemed or considered to be subject to, or in any manner affected by the said Act of February 8, 1887, or by any of the terms, provisions or conditions thereof.

(b) The said land was not possessed as alleged, by actual settlers nor the heirs or assigns of actual settlers under the terms of the said proviso.

(c) Defendant further represents that the New Orleans Pacific Railway Company complied with all the Acts of Congress under which the said lands were obtained, and that the said patent vested in said New Orleans Pacific Railway Company and in its transferees and assigns absolute and indefeasible title to the said land as shown by the recitals of the said patents.

Defendant further shows that the said sales and said transfers above set forth were made in good faith, for a valuable consideration, without notice of any defect in the title and vested complete legal and indefeasible title in the said vendees on the execution and passing of the said Acts of Conveyance, respectively, and that said vendors were each seized in fee thereof; and that during the said ownership as above set forth, each held owned and possessed the lands peaceably as the sole, legal and bona fide owners thereof. That the consideration expressed in said deeds attached hereto and made a part hereof, were bona fide and truly paid and that the vendees in said deeds were without notice of any outstanding claims to said land or defects in said title previous to and down to the time of paying said consideration, and the delivery of said deeds; and defendant denies that it, or its authors in title, had any notice of any settlement, occupancy of, or that any homestead pre-emption or other claims had attached to the said land. And

further shows that the title to the said lands under the patent issued to the New Orleans Pacific Railway Company has been confirmed, by the Act of Congress of March 3, 1887, March 3, 1891, and of March 2, 1896, the latter of which provides in the first section thereof, that suits to annul any patents to lands heretofore erroneously issued to any railroad or wagon road grant, shall only be brought within five years from the passage of the Act, and to vacate and annul any patents thereafter issued within six years from the date of the issuance of said patent, and the said Section further provides.

"But no patent to any lands held by bona fide purchasers shall be vacated and annulled, but the right and title of such purchaser is hereby confirmed."

Which said Acts of Congress, and the several provisions thereof, and especially the portion of the Act of March 2, 1896 just above quoted, are pleaded as muniments of title of defendant, specially confirming, if any confirmation is necessary, the title to the lands described by complainant, as bona fide purchasers of same, by virtue of the chain of title as above set forth.

And Defendant further pleads the provisions of the said Acts of Congress, March 3, 1887, March 3, 1891, and March 2, 1896 in bar of this suit, and shows that any right which complainant may have had at any time to institute this suit, has long since prescribed.

48 (d) The awarding and issuance of the aforesaid patent by the United States, through it's duly authorized department, was a final and conclusive adjudication by a legally constituted tribunal, charged by law with the duty of determining all the facts legally prerequisite to the issuance of said patent, and said adjudication was final and conclusive, and is not open to said attack as is set forth by intervenors herein, or at the time hereof.

Defendant refers to and adopts the patent to the New Orleans Pacific Railway Company and the certified copy of

the deeds named and described in the chain of title above set forth, attached to and incorporated into the answer to the original bill.

14.

This defendant further alleges that the sales and transfers of the land in question above set forth, were made in good faith and for a valuable consideration and vested a complete, legal and indefeasible title in the vendee of the New Orleans Pacific Railway Company and in the various vendees, predecessors in title of this defendant, and alleges that on execution and passing of the said acts of conveyance respectively, that during the time of ownership of each of the predecessors in title of this defendant, each thereof held, owned and possessed the said lands peaceably as the sole, legal and bona fide purchaser of the lands in question, having paid therefor the full, reasonable cash value of said land at the date of its purchase, and alleges that even if it should be proven that any error or irregularity was made in the issuance of the patent by the Government to the New Orleans Pacific Railway Company, yet such error or irregularity cannot be imputed by this defendant, defendant being a bona fide purchaser for value without notice of such error or irregularity and in actual ignorance thereof.

15.

Defendant adopts and makes part of this answer, to the intervention all and singular the pleas and answer hereinbefore filed to the original bill.

'WHEREFORE, Defendant prays that Intervenor's demand be rejected at his cost and that the defendant, Southland Lumber Company be quieted in its ownership and possession of the said land, the South Half (S $\frac{1}{2}$) of Northwest Quarter (NW $\frac{1}{4}$) and Northwest Quarter (NW $\frac{1}{4}$) of Southwest Quarter (SW $\frac{1}{4}$) Section Three (3) Township Three (3) North of Range Seven (7) West. Vernon Parish, Louisiana, and that its title thereto be confirmed according to law, particularly under Act of Congress of March 2, 1896, and defendant adopts the prayer of the answer to the

original bill and prays for such orders and further relief in the premises as to this Honorable Court may seem meet and in accordance with equity.

JAMES R. MONK
Attorney for Defendant,
Southland Lumber Company.

ENDORSED: No. 947 In Equity. United States of America, Pltf. vs New Orleans Pacific Railway Co. & Southland Lbr. Co. et als. Defts. ANSWER TO INTERVENTION OF STEPHEN N. GRANT. Filed Aug 19, 1915 Leroy B. Gulotta, Clerk, U. S. District Coury, [Court] West Dist. of Louisiana.

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In the
District Court of the United States for the Western District of Louisiana.

No. 947 In Equity.

UNITED STATES OF AMERICA,
vs.

NEW ORLEANS PACIFIC RAILWAY COMPANY,
W. R. PICKERING LUMBER COMPANY,
and
SOUTHLAND LUMBER COMPANY.

Now comes the United States, through undersigned counsel, and for answer to the intervention filed herein by Stephen N. Grant, admits the allegations thereof.

ROBERT A. HUNTER
Assistant United States Attorney.

ENDORSED: No. 947.

United States District Court,
Western District of Louisiana.

United States vs New Orleans Pacific Ry.
Company, W. R. Pickering Lumber Com-

pany and Southland Lumber Company.
 ANSWER OF UNITED STATES TO INTERVENTION OF STEPHEN N. GRANT.
 Filed Aug. 12, 1915, Leroy B. Gulotta, Clerk,
 U. S. District Court, West Dist. of Louisiana.

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In the
 District Court of the United States for the Western District
 of Louisiana.

No. 947 In Equity.

UNITED STATES OF AMERICA,

vs.

NEW ORLEANS PACIFIC RAILWAY COMPANY,
 W. R. PICKERING LUMBER COMPANY,
 and
 SOUTHLAND LUMBER COMPANY.

The following admissions of fact are made: subject to, without waiving, and with full reservation of all the pleas of prescription, laches, estoppel, right of action, cause of action, want of authority, and whatever other pleas, exceptions and defences appear in this record, and supplementing the allegations in the bill and admissions in the answer.

ADMISSION NO. 1.

It is admitted that the patent issued on March 3, 1885, as alleged in the bill, a certified copy of which patent, being patent No. 2 of said date, is attached hereto and made a part of this stipulation, and marked "Government's Exhibit No. H."

It is agreed that the Clerk of Court in making up the transcript of appeal herein shall omit from said patent the descriptions of the various lands embraced therein other than the land herein involved which is included in the following description:

"NORTH OF BASE LINE AND WEST OF LOUISIANA PRINCIPAL MERIDIAN, LOUISIANA.

NATCHITOCHES DISTRICT — TWENTY MILE LIMITS.

* * * * *

TOWNSHIP THREE, RANGE SEVEN.

* * * * *

The South West Quarter and the North Half of Section Three.

* * * * *

ADMISSION NO. 2.

It is admitted that the date of the transfer from the New Orleans, Baton Rouge and Vicksburg Railroad Company to the New Orleans Pacific Railway Company of the grant in question was January 5, 1881.

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ADMISSION NO. 3.

It is admitted that on November 17, 1882, the New Orleans Pacific Railway Company filed maps in the General Land Office showing the location and construction of its line of road opposite the land in question in this suit, which map the Act of Feb. 8th, 1887, provided "shall indicate the definite location of said road."

ADMISSION NO. 4.

It is admitted that prior to the passage of the Act of February 8, 1887, there was considerable agitation relative to the grant and opposition thereto, as a result of which the said act was passed, and, subsequently, in 1892, the General Land Office was holding up, because of settler's claims under said Act of February 8, 1887, many selection lists and patents of the New Orleans Pacific Railway Company, and in order to secure the early approval and issuance of the same, the agreement of date August 3, 1892, was entered into. (See Gov. Ex. B).

ADMISSION NO. 5.

It is admitted that the lands herein involved were within the limits and jurisdiction of the United States District Land Office located at Natchitoches, Louisiana, which Land Office was existing and open from and prior to 1871, and has continued to exist until transferred to New Orleans, and, subsequently, to Baton Rouge, Louisiana, within the last few years, and at said points of transfer continued in existence and open for business.

ADMISSION NO. 6.

It is admitted that the lands were surveyed and the lines established by an official survey of the United States Government and open for settlement and entry as a part of the public domain of the United States prior to 1871.

ADMISSION NO. 7.

It is admitted that the New Orleans Pacific Railway Company has parted with title to various individuals and purchasers of practically all the lands it obtained under its grant.

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ADMISSION NO. 8.

The New Orleans, Baton Rouge and Vicksburg Railroad Company designated the general route of its road as near as might be and filed a map of the same in the Department of the Interior on November 11, 1871, which designation and map were accepted by the Secretary of the Interior.

On November 29, 1871, the Secretary of the Interior made an order of withdrawal of both place and indemnity lands, and transmitted said order to the local land office in the State of Louisiana affected thereby; said order of withdrawal was filed in the New Orleans Land Office December 11, 1871, and in the Natchitoches Land Office December 20, 1871.

Copies of the letters instructing said withdrawals being dated November 29, 1871, are attached hereto and made a part of the record in this cause. (Marked Govt. Ex. "I" and Govt. Ex. "J".

The indemnity withdrawal for this railroad was revoked by order of the Secretary of the Interior dated August 15, 1887.

ADMISSION NO. 9.

It is agreed that the House Report (No. 2698, 49th Congress, First Session) and the Senate Report (No. 711, 47th Congress, First Session) be filed by reference and copied from printed report of the hearings before the Committee on Public Lands in the House of Representatives on H. R. 5890, of date January 26 and 27, 1914, pages 118 to 135, for the purpose of showing the general history of the grant.

ADMISSION NO. 10.

It is admitted that the property involved in this suit is within the place limits of the grant made by act of Congress of March 3, 1871, to the New Orleans, Baton Rouge & Vicksburg Railroad Company.

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ADMISSION NO. 11.

It is admitted:

(a) That the defendant W. R. Pickering Lumber Company has chain of title to the northeast quarter of the southwest quarter, Section 3, Township 3 North, Range 7 West, involved in this suit as set forth in its answer to this case, paragraph 11. And that the said deeds are duly recorded in the conveyance books of Vernon Parish as of dates and pages alleged in said answer. The production of the originals or certified copies of said deeds is dispensed with.

(b) That the defendant Southland Lumber Company has chain of title to the north west quarter of the southwest quarter, and the south half of the northwest quarter, Section 3, Township 3 North, Range 7 West, involved in this suit as set forth in its answer to this case, paragraph 11. And that the said deeds are duly recorded in the conveyance books of Vernon Parish as of dates and pages alleged in said answer. The production of the originals or certified copies of said deeds is dispensed with.

ADMISSION NO. 12.

It is admitted:

(a) That the W. R. Pickering Lumber Company and its authors in title, as set forth in its answer paragraph No. 11, have had the northeast quarter of the southwest quarter, Section 3, Township 3 North, Range 7 West, regularly assessed to them from the date of patent covering same until the present time, and have regularly paid the taxes due thereon during this time.

(b) That the Southland Lumber Company and its authors in title, as set forth in its answer paragraph No. 11, have had the northwest quarter of the southwest quarter, and the south half of the northwest quarter, Section 3, Township 3 North, Range 7 West, regularly assessed to them from the date of patent covering same until the present time, and have regularly paid the taxes dur [due] thereon during this time.

ADMISSION NO. 13.

It is admitted that from 1880 to 1885, inclusive, Thomas J. Killen had assessed to him the improvements on the land described in this bill and paid taxes thereon for said years. It is further admitted that in 1890 inter-
54
venor Stephen N. Grant had the same improvements assessed to him, and has continued to have said improvements assessed to him until 1914, inclusive, and paid taxes on same during said years.

ADMISSION NO. 14.

It is admitted that the land involved in this suit was transferred by the New Orleans Pacific Railway Company without warranty of title except as against its own acts and those claiming by, through, or under it. (See Admission 20)

ADMISSION NO. 15.

It is admitted that the defendant companies and their authors in title paid a fair price for the lands in question

at the time of their respective purchases; and it is further admitted that before the purchase of said lands by the Southland Lumber Company the said company had the title to said lands examined by its attorneys, Lane & Waterman, of Davenport, Iowa, and that said attorneys approved said title, said approval being based upon an abstract containing the chain of title to said property as disclosed by the conveyance and mortgage records of the parish of Vernon, Louisiana, and that said company purchased said land upon the approval of the title thereof by said attorneys as aforesaid.

ADMISSION NO. 16.

It is admitted that on the trial of the above numbered and entitled cause, Stephen N. Grant, Intervenor, was sworn as a witness therein and was asked whether or not he, the said Stephen N. Grant, ever filed any other homestead application in addition to the application filed by him for the entry of the land described in the bill of complaint, and the said Stephen N. Grant testified that the application made by him for the entry of the lands here in question was the only application ever made or filed by him for the entry of lands under the public land laws of the United States. Said testimony was inadvertently omitted from the note of evidence herein, and this admission is made for the purpose of supplying said omission. This admission is made subject to all objections made by defendants and recorded on the stenographic report of the testimony herein.

ADMISSION NO. 17.

It is admitted that the lands in question were selected by the New Orleans Pacific Railway Company, as shown by certified copy of selection list, affidavit and certificate of Register and Receiver, marked Government's Exhibit K, which is attached hereto and made a part of this document, and that said lists were approved by the Secretary of the Interior March 3, 1885, as shown by certified copy of said approval filed and marked Government's Exhibit L, which is hereto attached and made a part of this

document. It is further agreed that in copying said approval in the transcript the clerk shall omit the description of lands, in place of said description stating "Here follows description of lands involved in this suit, and other lands."

ADMISSION NO. 18.

It is admitted that there has been no voluntary non-suit or final decree in Equity suit No. 16 on the docket of this Court, a portion of the record of which was offered in evidence, in so far as the land involved in this suit is concerned.

ADMISSION NO. 19.

It is admitted that the lands in controversy are worth in excess of Twelve Hundred Dollars (\$1200.00).

ADMISSION NO. 20.

It is admitted that in the deeds from the New Orleans Pacific Railway Company to John T. Granger and Augustus C. Brown, under whom the Southland Lumber Company claims title, and the deed from New Orleans Pacific Railway Company to Smith H. Mallory, under whom the W. R. Pickering Lumber Company claims title, that John F. Dillon and Henry M. Alexander, Trustees of a mortgage resting against said property, joined in said deed "as mortgagees only and for the sole purpose of releasing, remising and quit-claiming" unto the said purchaser the said property described

therein, and "for the purpose of consenting that
 56 as to the lands herein conveyed, but only as to the
 same, the inscription of the said land grant mortgages may be cancelled * * * * * * * The said Trustees are not to be held in any warranty in the premises, all warranty of every kind and nature being expressly excluded."

ADMISSION NO. 21.

It is admitted that in the deed from Statie M. Fisher, et al., to W. R. Pickering Lumber Company, of date August 15, 1902, there was included, besides the land in question now claimed by said W. R. Pickering Lumber Company, sev-

eral thousand acres of other land, and that the consideration was \$45,116.68, of which amount \$11,279.17 was paid in cash and the W. R. Pickering Lumber Company executed its three notes, each for \$11,279.17, payable October 7, 1902, October 7, 1903, and October 7, 1904. And it is further admitted that the consideration paid by the Southland Lumber Company in its purchases of the lands herein involved claimed by it was paid in cash.

ADMISSION NO. 22.

It is admitted that Act of February 8, 1887, to declare forfeiture of the lands granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company and to confirm title to certain lands, and for other purposes, as it originally passed the House of Representatives July 24, 1886, read as follows:

"BE IT ENACTED, &c., That the lands granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company by the act entitled "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes," approved March 3, 1871, are hereby declared to be forfeited to the United States of America in all that part of said grant which is situate on the east side of the Mississippi River, and also in all that part of said grant on the west of the Mississippi River which is opposite to and coterminous with the part of the New Orleans Pacific Railroad Company which was completed on the 5th day of January, 1881; and said lands are restored to the public domain of the United States.

Sec. 2. That the title of the United States and of the original grantee to the lands granted by said act of Congress of March 3, 1871, to said grantee, the New Orleans, Baton Rouge and Vicksburg Railroad Company, not herein declared forfeited, is relinquished, granted, conveyed, and confirmed to the New Orleans Pacific Railroad Company, as the assignee of the New Orleans, Baton Rouge and Vicksburg Railroad Company, said lands to be located in accordance

with the map filed by said New Orleans, Baton Rouge and Vicksburg Railroad Company in the Department of the Interior, which indicates the established line of said railroad.

57 SEC. 3. That the relinquishment of the lands and the confirmation of the grant provided for in the second section of this act are made and shall take effect whenever the Secretary of the Interior is notified that said New Orleans Pacific Railroad Company, through the action of a majority of its stockholders, has accepted the provisions of this act, and is satisfied that said company has accepted and fully discharged all the duties and obligations imposed upon the New Orleans, Baton Rouge and Vicksburg Railroad Company by the act of March 3, 1871, entitled "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes."

SEC. 4. That it shall be the duty of the Secretary of the Interior, in issuing patents for the lands conveyed herein, to establish such rules and regulations as to enable all persons who on the 1st day of December, 1884, were in the actual occupancy of any of the lands to which the New Orleans Pacific Railroad Company is entitled under the provisions of this act, and who are of the description of persons entitled to make homestead or pre-emption entry on public lands under the general laws of the United States, to secure titles to the lands so held by them, not to exceed in quantity one quarter-section and not less than one-sixteenth of a section, on the payment to said company, in lawful money of the United States, at the rate of \$2 per acre, for the lands so occupied, at one-third cash and balance in such equal annual installments as the Secretary of the Interior shall by regulations prescribe; it being the intention of this section to protect the settlers upon said lands, and to give binding force and effect to the Blanchard-Robinson agreement made with the New Orleans Pacific Company on the day of , , and filed in the office of the Secretary of the Interior.

SEC. 5. That the Secretary of the Interior shall make all needful rules and regulations for carrying this act into effect, and shall have the authority to direct, if he shall think proper, and shall so declare in such regulations, that payments may be made for the lands held and occupied under the fourth section of this act in not exceeding four equal annual installments from the date of sale, with interest thereon not to exceed 6 per cent. per annum.

SEC. 6. That the patents for the lands conveyed herein that have already been issued to said company be, and the same are hereby confirmed [confirmed]; but the Secretary of the Interior is hereby fully authorized and instructed to apply the provisions of the fourth and fifth sections of this act to any of said lands that have been so patented, and to protect any and all settlers on said lands in all their rights under the said Blanchard-Robinson agreement." and that the bill above quoted, which afterwards became Act of February 8, 1887, was amended in the Senate in January, 1887, so as to read as finally adopted. The Senate amendment added to Section 2 the following proviso:

"Provided that all said lands occupied by actual settlers at the date of the definite location of said road and still remaining in their possession, or in possession of their heirs or assigns, shall be held and deemed excepted from said grant, and shall be subject to entry under the public land laws of the United States."

and that Section 6 of said bill as passed by the House of Representatives July 24, 1886, was amended by the Senate so as to provide

"that the Secretary of the Interior should apply the provisions of the second and third, as well as the fourth and fifth, sections of the act to any lands that have 58 been patented, and that he should protect any and all settlers on said lands in their rights under the said sections of this act (the original having read "under the said Blanchard-Robinson agreement")."

ADMISSION NO. 23.

It is agreed that the letter of instructions of Secretary Lamar to Acting Commissioner Stockslager, of November 22, 1887, be copied in the record by the Clerk, from Sixth Land Decisions, page 276, as Government's Exhibit M.

ADMISSION NO. 24.

Counsel for the Government offer in evidence as Government's Exhibit N certified copy of the petition of the Receiver of the New Orleans Pacific Railway Company to the United States Circuit Court for the Eastern District of Louisiana for authority to reconvey certain lands to the United States, together with order thereon, exhibits attached and deed of reconveyance in accordance therewith, it being admitted that the lands listed in Exhibit A attached to the petition are lands in which the homestead settlers therein named had not filed any homestead claims in the Land Office prior to February 8, 1887, which offering is objected to on behalf of all the defendants, for the reason that it is immaterial, irrelevant, and inadmissible res inter alias acta. And for the further reason that said petition, being made by a Receiver of the New Orleans Pacific Railway Company, who is an officer of the Court and acting under the orders of the Court, and his acts not authorized or sanctioned by the company or its assigns. And said petition being subject to the sale of said lands to the assigns of the New Orleans Pacific Railway Company. And for the further reason that said petition is based on, and in purported compliance with, the agreement of the New Orleans Pacific Railway Company, of date August 3, 1892, and, therefore, inadmissible as a judicial admission or interpretation by the said company of the Act of February 8, 1887, and for the further reason that the petition and the agreement are ex parte

proceedings made without the knowledge or authority of the board of directors of the New Orleans Pacific Railway Company or its assigns or stockholders, or the defendants in this case, and subsequent

to the disposal by the New Orleans Pacific Railway Company of all right, title and interest it had to any of the land here in question, and therefore not binding on the present owners.

GEO. WHITFIELD JACK

United States Attorney.

ROBERT A. HUNTER

Assistant United States Attorney.

F. G. HUDSON. By J. G. PALMER.

Solicitor for New Orleans, Pacific Railway Company.

JAS. G. PALMER.

Solicitor for W. R. Pickering Lumber Company.

JAS. R. MONK.

Solicitor for Southland Lumber Company.

DON E. SORELLE

Solicitor for Intervenor.

ENDORSED: No. 947.

United States District Court,
Western District of Louisiana.

United States vs. New Orleans Pacific Ry.
Company, and W. R. Pickering Lumber
Company, and Southland Lumber Company.
AGREEMENT OF FACTS ENTERED
INTO BY ATTORNEYS FOR PLAINTIFF,
DEFENDANTS AND INTERVENOR, and copies of two letters signed
by Commissioner of General Land Office attached and made part of this stipulation.

Filed Nov. 6, 1915, Leroy B. Gulotta, Clerk,
U. S. District Court, West Dist. of Louisiana.

60 (HOUSE REPORT NO. 2698, FORTY-NINTH CONGRESS, FIRST SESSION.)

New Orleans, Baton Rouge and Vicksburg Railroad Company.

June 1, 1886.—Referred to the House Calendar and ordered to be printed.

Mr. Laffoon, from the Committee on the Public Lands, submitted the following report (to accompany bill H. R. 3186) :

The Committee on the Public Lands, to whom was referred the bill (H. R. 3186) entitled "A bill to declare a forfeiture of lands granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company, to confirm title to certain lands, and for other purposes," having had the same under consideration, make the following report:

The New Orleans, Baton Rouge and Vicksburg Railroad Company was chartered by an act of the Legislature of Louisiana dated December 30, 1869. By said act it was clothed with authority to construct and operate a railroad from any point on the line of the New Orleans, Jackson and Great Northern Railroad within the Parish of Livingston, running thence to any point on the line dividing the States of Louisiana and Mississippi. The line thus indicated by its charter was and is east of the Mississippi River, as far as Baton Rouge. It was also authorized by the terms of its charter to construct and operate a branch railroad from its main line, as above described, to the City of Baton Rouge; and for the purpose of connecting its railroad with the railroads of other companies, &c., it was furthermore authorized "to construct, maintain, and use by running thereon its engines and cars, such branch railroad and tracks as it may find necessary to own and use," and such branch railroads were to be considered as a part of its main track in the State of Louisiana.

The New Orleans, Baton Rouge and Vicksburg company was only supported by private capital to aid in its completion until the act of Congress, dated March 3, 1871,

known as "the Texas Pacific grant", was enacted, among other things, for the purpose of aiding in its construction. The twenty-second section of said act reads as follows:

"That the New Orleans, Baton Rouge and Vicksburg Railroad Company, chartered by the State of Louisiana, shall have the right to connect by the utmost eligible route, to be selected by said company, with the said Texas & Pacific Railroad at its eastern terminus, and shall have the right of way through the public land to the same extent granted hereby to the said Texas Pacific Railroad Company; and in aid of its construction from New Orleans to Baton Rouge, thence by way of Alexandria, in said State, to connect with said Texas Pacific Railroad Company at its eastern terminus, there is hereby granted to said company, its successors and assigns, the same number of alternate sections of public land per mile in the State of Louisiana as are by this act granted in the State of California to said Texas Pacific Railroad Company; and said lands shall be withdrawn from market, selected, and patents issued therefor, and open for settlement and preemption upon the same terms and in the same manner and time as is provided for and required from said Texas Pacific Railroad Company within said State of California: PROVIDED, That said company shall complete the whole of said road within five years from the passage of this act."

On November 11, 1871, this Company filed in the General Land Office a map designating the general route of a road projected by it from Shreveport, by way of Alexandria, to Baton Rouge, and thereupon a withdrawal of the public lands along said route was made to take effect in April, 1873.

On February 1^s, 1873, a second map was filed in the General Land Office by the same company, designating the general route of a road projected by it from New Orleans to Baton Rouge, and a withdrawal of the public lands along said route was ordered, which took effect in April, 1873.

61 The five years in which this road was to be completed expired on March 3, 1876, and dur-

ing all this period nothing has been done by this company to earn this grant. Owing to this neglect in performing or attempting to perform this grant, the Legislature of Louisiana, by an act approved April 30, 1877, repealed the charter of the company and all acts amendatory thereof.

The repealing act of the legislature of the State of Louisiana is as follows:

AN ACT To repeal an act entitled "An act to incorporate the New Orleans, Baton Rouge and Vicksburg Railroad Company, and to expedite the construction of their road," number one hundred and forty-three, approved December thirty, eighteen hundred and sixty-nine; and also an act entitled "An act authorizing certain parishes, cities and towns, by contributing to the New Orleans, Baton Rouge and Vicksburg Railroad Company, or by subscribing for its stock, or by purchasing its bonds, or by issuing the bonds and warrants of the said parishes, cities and towns, to aid in the construction of the road of the said company or its branch or branches," number eighty, approved March sixteen, eighteen hundred and seventy; and also an act entitled "An act authorizing the parishes of Livingston, St. Helena, East Feliciana, East Baton Rouge and the city of Baton Rouge to aid in the construction of the New Orleans, Baton Rouge and Vicksburg Railroad, number one hundred and forty-five, approved December thirty, eighteen hundred and sixty-nine.

SECTION 1. BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE STATE OF LOUISIANA IN GENERAL ASSEMBLY CONVENED, That the act entitled "An act to incorporate the New Orleans, Baton Rouge and Vicksburg Railroad Company, and to expedite [expedite] the construction of their road, No. 143, approved December thirty, eighteen hundred and sixty-nine; and also the act entitled "An act authorizing certain parishes, cities and towns, by contributing to the New Orleans and Vicksburg Railroad Company, or by subscribing for its stock, or by purchasing its bonds, or by issuing the bonds and warrants of said parishes, cities or towns, to aid in the construction of the road of

aid company or its branch or branches," No. (80), approved March sixteen, eighteen hundred and seventy; and also the act entitled "An act authorizing the parishes of Livingston, St. Helena, East Feliciana, East Baton Rouge, and the city of Baton Rouge to aid in the construction of the New Orleans, Baton Rouge and Vicksburg Railroad", No. 145, approved December thirty, eighteen hundred and sixty-nine, be, and the same are hereby repealed.

SEC. 2. BE IT FURTHER ENACTED, &c., That this act shall take effect from and after its passage, and that all laws and parts of laws contrary to the provisions of this act be, and the same are hereby repealed.

In the meantime the New Orleans Pacific Railway Company was incorporated by notarial act under the general laws of the State of Louisiana, approved April 7, 1875, and the legislature of that State, by act approved February 14, 1876, confirmed its corporate existence and enlarged its powers. Said charter was further amended by an act of the legislature of said State on the 5th day of February, 1878, still further enlarging and confirming the powers and franchises of said Company.

62 On the 9th day of June, 1877, a few days after the repeal of the Charter of the New Orleans, Baton Rouge and Vicksburg Railroad Company, Jeremiah Counsellor filed his suit in the Circuit Court of the United States in and for the Fifth Circuit and District of the State of Louisiana against the New Orleans, Baton Rouge and Vicksburg Railway Company, alleging that he was the owner and holder of a quantity of its mortgaged bonds for valuable consideration paid to them, and denying the constitutionality of the act of the legislature forfeiting its franchises and corporate existence as against its acquired rights and the vested rights which he had by virtue of his ownership for valuable consideration of said mortgage bonds. The Court, after various proceedings, decided, on June 11, 1877:

"That act No. 110 of the extra session of the general assembly (the act referred to) of the State of Louisiana for

the year 1877 is unconstitutional, invalid, and without the slightest effect."

After the judgment in this case was rendered—to-wit, on the 29th of December, 1880—the board of directors of the New Orleans, Baton Rouge and Vicksburg Railway Company held a meeting at their office in the City of New York, at which the following resolution was passed:

"RESOLVED, That the president and secretary of this company be, and they are hereby, authorized to transfer to the New Orleans Pacific Railroad Company, on such terms as they shall see fit, all the right, title and interest of this company in and to the land granted to this company by an act of Congress approved March 3, 1871, entitled "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes" and to make and execute in the name of this company such deed or instrument as shall be necessary to complete such transfer.

"On motion the meeting was adjourned subject to the call of the president.

"WM. M. BARNUM, Secretary."

On the 5th day of January, 1881, the New Orleans, Baton Rouge and Vicksburg Railway Company sold and conveyed—

"All the right, title and interest of the said party of the first part, its successors or assigns, of, in or to a certain grant of public lands granted to the said party of the first part by an Act of Congress of the United States, approved March 3, 1871, and entitled "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes", together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise pertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof."

On the 3d day of February, 1881, the directors of the New Orleans Pacific Railway Company passed this resolution:

RESOLVED, That the president of this company be, and he is hereby authorized to accept the transfer to this company from the New Orleans, Baton Rouge and Vicksburg Railroad Company of the land grant made to the latter by the Act of Congress of March 3, 1871, and to execute any documents necessary to evidence the acceptance of such transfer."

At a meeting of the stockholders of the New Orleans, Baton Rouge and Vicksburg Railroad Company, on the 9th day of December, 1881, the following resolution was adopted:

RESOLVED, That the action of the Board of Directors and Officers of this company in transferring to the New Orleans Pacific Railway Company all the right, title, and interest of the Company to the lands granted to this Company by act of Congress approved March 3, 1871, and entitled "An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes, be, and it is hereby, approved, ratified and confirmed."

63 The New Orleans Pacific Railway Company, by virtue of all these facts, had become complete owners of all the property which had been granted by the United States to the New Orleans and Baton Rouge Railway Company, and were subrogated to all the rights of that company, subject, of course, to whatever right General Government had to forfeit this grant for failure to complete the road in time fixed by the law creating the original donation. The New Orleans Pacific Railway Company now owning the property, as stated, under grant from the General Government to the other company, was authorized to construct, own, and maintain a road from any point in the State of Louisiana to Shreveport, or to Dallas or Marshall, Texas, on any route or routes they saw proper to select. The line which this company projected was in the same general direction as the route which had been indicated by the New Orleans, Baton Rouge and Vicksburg Company on file in the General Land Office, except that the latter was on the east side of the river and the former

on the west side of the Mississippi, but within the granted limits.

The New Orleans Pacific Railroad Company, after obtaining the deed above mentioned from the New Orleans, Baton Rouge and Vicksburg Company, before the construction of any of their road, applied to the General Land Office and Interior Department for information as to the recognition of the validity of the transfer of land to it on the part of the authorities of the United States. On February 17, 1881, the Interior Department sent said Company the following answer:

DEPARTMENT OF THE INTERIOR, GENERAL LAND
OFFICE,

Washington, D. C., February 17, 1881.

Sir: In compliance with the verbal request of Hon. J. H. Ketcham, I make the following statement:

By the twenty-second section of an act of Congress entitled "An act to incorporate the Texas Pacific Railroad Company", &c., approved March 3, 1871, a grant of land was made to the New Orleans, Baton Rouge and Vicksburg Railroad Company for the purpose of aiding in the construction of its road.

At a special meeting of the directors of said New Orleans, Baton Rouge and Vicksburg Railroad Company, held December 29, 1880, a resolution was adopted authorizing the president and secretary of the company to transfer all the right, title, and interest of said company in and to said grant to the New Orleans Pacific Railway Company, and to make and execute such instruments as should be necessary for that purpose.

On the 5th day of January, 1881, the president and the secretary, pursuant to said authority, executed a deed in the name of the New Orleans, Baton Rouge and Vicksburg Company, conveying all the right, title, and interest of said company in and to said grant to the New Orleans Pacific Railway Company.

On the 3d day of February, 1881, the directors of the last-named company adopted a resolution authorizing the president of the company to accept said conveyance and to execute any documents necessary to evidence the acceptance.

There can be no doubt that when the president of the New Orleans Pacific Railway Company accepts said transfer the company will be fully vested with all the right, title, and interest which the New Orleans, Baton Rouge and Vicksburg Company has in and to said grant.

J. A. WILLIAMSON,
Commissioner.

On the 21st of February, 1871, the Interior Department made the following statement:

DEPARTMENT OF THE INTERIOR, GENERAL LAND
OFFICE,

Washington, D. C., February 21, 1881.

Sir: The president of the New Orleans Pacific Railway Company has duly accepted, in behalf of said company, the deed referred to in my letter addressed to you, dated February 17, 1881, being the deed to the said New Orleans Pacific Railway Company by the New Orleans, Baton Rouge and Vicksburg Railroad Company of all its right, title, and interest in and to the grant to said last-named company by the twenty-second section of an act of Congress entitled "An act to incorporate the Texas Pacific Railroad Company," &c., approved March 3, 1871.

The transfer by the said New Orleans, Baton Rouge and Vicksburg Railroad Company of all its right, title and interest in and to said grant to the said New Orleans Pacific Railway Company is now complete.

Very respectfully,

J. A. WILLIAMSON,
Commissioner.

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W. H. Barnum,

President of the New Orleans, Baton Rouge and Vicksburg Railroad Company.

The road was completed, accepted by the Government and classified as a land-grant road before any hostile legislation was offered in Congress.

These events in their order show that before its acceptance of the grant of land under the deed which your committee have referred to, the company was careful that their title would be effectual. The company, except as hereafter to be mentioned, built and constructed their road with the understanding with the officers of the Government that it would be entitled to the land embraced in the grant. As the road progressed in its construction the land to which it claimed title was duly certified to it and patents issued therefor, and the settlers who are on this land have acted on this theory in their purchases from the railroad company, and your committee deems it unjust, unwise, and contrary to public policy to interrupt the title to said lands which lie coterminous with the road actually built by said company. Said company have obtained money to construct their road on the idea that they were the owners of said land as construction progressed; and with a view to settle all questions of title to the land which is coterminous with the road actually built by said company, we approve of the bill.

In aid of the views which your committee entertain on this subject we desire to say that the question of the Power of Congress to forfeit the lands which the New Orleans Pacific Company claims to have earned was submitted by a joint resolution introduced by Mr. Louis, a Representative from the State of Louisiana, to the Judiciary Committee of this House on April 21, 1874, and in an exhaustive report, after reviewing all the facts and numerous citations of authorities, they conclude as follows:

"The facts already set forth with sufficient fullness satisfy your committee that the substantial fulfillment of the condition has been met by the assignee company; that

it was done under the eye of and was accepted by the executive department under the provisions of the law of Congress; that all which Congress contemplated in making the grant has been realized, and that it was done by the company on the belief of having secured the grant—a belief based upon the assurance of the Department of the Interior and upon the official action of the President of the United States in the examination of the work as it progressed in his sanction of its sufficiency under the law and in his order for the issue of patents for the land. After all this the question is, can—and if it can, ought—Congress to forfeit the land grant to this assignee company?

"Your committee think both branches of the question must be answered in the negative."

The same questions, by a similar resolution, were submitted to the Senate and referred to the Committee on Railroads, and their report is herewith appended:

(SENATE REPORT NO. 711, FORTY-SEVENTH CONGRESS, FIRST SESSION.)

IN THE SENATE OF THE UNITED STATES.

June 7, 1882.—Ordered to be printed.

Mr. Jonas, from the Committee on Railroads, submitted the following report:

The Committee on Railroads, to whom the subject was referred, submit the following report:

A petition has been referred to the Committee on Railroads of certain citizens of Louisiana, asking for the forfeiture of the land grant made to the New Orleans, Vicksburg and Baton Rouge Railroad Company by the ninth section of the act entitled "An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of

its road, and for other purposes," approved March 65 3, 1871, on the ground that the company to other

purposes," approved March 3, 1871, on the ground that the company to whom the grant was made has failed to build the road within the time prescribed by the act.

The grant was made to the New Orleans, Baton Rouge

and Vicksburg Railroad Company, its successors and assigns. That company was incorporated by an act of the Legislature of Louisiana, approved December 30, 1869. The object of Congress in making the grant was to aid in the construction of the proposed road, via Baton Rouge, Alexandria, and Shreveport, to connect with the eastern terminus of the Texas Pacific Railroad, and thus connect that road with the Mississippi River and the Gulf of Mexico.

The committee find that this connecting road, on almost the same line, and between the same points (if not built by the original grantees) has been built by the New Orleans Pacific Railway Company, which was organized under a charter confirmed by an act of the Legislature of Louisiana, approved February 19, 1876. This road is now completed and running between New Orleans and the eastern terminus of the Texas Pacific Railroad, at or near Marshall, Tex., its route being via Baton Rouge, Alexandria and Shreveport.

The New Orleans, Baton Rouge and Vicksburg Railroad Company (which still has corporate existence), by deed dated the 5th day of January, 1881, granted and transferred to the New Orleans Pacific Railway Company all its right, title, and interest in and to the lands granted to it by the before-mentioned act of Congress incorporating the Texas Pacific Railroad Company. This transfer was approved, ratified and confirmed at a meeting of the stockholders of the New Orleans, Baton Rouge and Vicksburg Railroad Company by a vote of two-thirds of its entire capital stock. The transfer was formally accepted by the board of directors of the New Orleans Pacific Railway Company.

The deed of transfer, a certified copy of the resolution of the stockholders of the New Orleans, Baton Rouge and Vicksburg Railroad Company ratifying the transfer, and a certified copy of the resolution of the board of directors of the New Orleans Pacific Railway Company accepting the transfer, have been filed in the Department of the Interior.

A commissioner to inspect a portion of the road built by the New Orleans Pacific Railway Company was, upon

the application of that company, appointed by the President of the United States, and the report of the said commissioner, approving the construction of the portion of the railroad inspected by him, was duly filed in the Department of the Interior.

Application is now made for the issuance of patents to the New Orleans Pacific Railway Company for the lands granted by Congress to the New Orleans, Baton Rouge and Vicksburg Railroad Company, and by the last-named company assigned to the New Orleans Pacific Railway Company as heretofore stated.

The grant was originally made to the New Orleans, Baton Rouge and Vicksburg Railroad Company, its successors and assigns for the purposes above stated.

The road has been built by the assignees of the grantee, and the object of the grant have been fully attained.

No forfeiture of the grant was made before the completion of the road, on the grounds alleged, and we think it would be unjust and inequitable to make such forfeiture now when the work has been completed by the assignee company, which has built the road in good faith and in full expectation of receiving the benefit of the grant which remained unforfeited and assignable in the control of their grantor.

Your committee think no consideration of public policy requires the forfeiture of the grant, and they recommend that the committee be discharged from further consideration of the memorial.

Your committee desires also in support of the views which they entertain to append to their report the opinions of the Attorney General of the United States which is embraced in a letter written by him to the Secretary of the Interior on June 13, 1882, which is as follows:

DEPARTMENT OF JUSTICE,

Washington, D. C., June 13, 1882.

Sir: By a letter dated the 5th of January last, your predecessors submitted to me a number of questions aris-

ing upon an application of the New Orleans Pacific Railway Company for certain lands claimed under the land grant made to the New Orleans, Baton Rouge and Vicksburg Railroad Company by the Act of Congress of March 3, 1871, chapter 122.

66 The land grant mentioned is contained in the twenty-second section of that act, which provides:

That the New Orleans, Baton Rouge and Vicksburg Railroad Company, chartered by the State of Louisiana, shall have the right to connect, by the most eligible route, to be selected by said company, with the said Texas Pacific Railroad at its eastern terminus and shall have the right of way through the public land to the same extent granted hereby to the said Texas Pacific Railroad Company; and in aid of its construction from New Orleans to Baton Rouge, thence by the way of Alexandria, in said State, to connect with the said Texas Pacific Railroad Company at its eastern terminus, there is hereby granted to said company, its successors and assigns, the same number of alternate sections of public land per mile, in the State of Louisiana, as are by this act granted in the State of California to said Texas Pacific Railroad Company; and said lands shall be withdrawn from market, selected, and patents issued therefor, and opened for settlement and redemption, upon the same terms and in the same manner and time as is provided for and required from said Texas Pacific Railroad Company, within said State of California; PROVIDED. That said company shall complete the whole of said road within five years from the passage of this act."

The eastern terminus of the Texas Pacific Railroad, as fixed by the same act, was a point at or near Marshall, Tex.

The New Orleans, Baton Rouge and Vicksburg Railroad Company was incorporated by an act of the Legislature of Louisiana passed December 30, 1869, which authorized it to construct and operate a railroad "from any point on the line of the New Orleans, Jackson and Great Northern Railroad, within the Parish of Livingston, running from thence to any point on the boundary line dividing the States of Lou-

isiana and Mississippi," the route here indicated lying east of the Mississippi River. It was also authorized to construct and operate a branch railroad from its main line (above described) to the City of Baton Rouge; and for the purpose of connecting its railroad with the railroads of other companies, &c., it was furthermore authorized "to construct, maintain, and use, by running thereon its engines and cars, such branch railroads and tracks as it may find necessary and expedient to own and use"; and such branch railroads were, for all the purposes of the act, to be deemed and taken to constitute a part of the main line of its Railroad within the State of Louisiana.

On November 11, 1871, that company filed in the General Land Office a map designating the general route of a road projected thereby from Shreveport, by way of Alexandria, to Baton Rouge, and thereupon a withdrawal of the public lands along the same were ordered, which became effective in December following.

Subsequently, by an act of the Legislature of Louisiana, passed December 11, 1872, the same company was given "full power and authority to commence the construction of their road in the City of New Orleans or Shreveport, or at any intermediate point on their line of road, as may best suit the convenience of said company and facilitate the speedy construction of a continuous line from the City of New Orleans to the City of Shreveport, or perfect railroad communication with the Texas Pacific Railroad, or any other railroad in northwestern Louisiana, at or near the Louisiana State Line; PROVIDED, HOWEVER, That the said company shall construct the line of its road between the City of New Orleans and the City of Baton Rouge on the east side of the Mississippi River to the corporate limits of the said City of Baton Rouge or adjacent thereto."

In the meantime, by the act of Congress of May 2, 1872, chapter 132, the Texas and Pacific Railroad Company (formerly styled the Texas Pacific Railroad Company), was "authorized and required to construct, maintain, control, and operate a road between Marshall, Texas,

and Shreveport, Louisiana, or control and operate any existing road between said points, of the same gauge as the Texas and Pacific Railroad." The said act further provided that "all roads terminating at Shreveport shall have the right to make the same running connections, and shall be entitled to the same privileges, for the transaction of business in connection with the said Texas and Pacific Railway, as are granted to roads intersecting therewith."

On February 13, 1873, a second map was filed in the General Land Office by the New Orleans, Baton Rouge and Vicksburg Railroad Company, designating the general route of a road projected thereby from New Orleans to Baton Rouge and a withdrawal of the public lands along the same was ordered, which took effect in April, 1873. The route between those places, those designated, lies on the east side of the Mississippi River. That company has not constructed any part of its road, either on the route between New Orleans and Baton Rouge or on the route between the latter place and Shreveport; nor, indeed, has there been a definite location of its road anywhere between the points mentioned. Nothing beyond the designation of the route thereof appears.

67 Pursuant to a resolution of its board of directors, adopted December 29, 1880, all the right, title and interest of that company in and to the aforesaid grant of public lands made by the Act of March 3, 1871, were deeded by it to the New Orleans Pacific Railway Company. This action of the Board of Directors and officers of the former company was afterwards approved and ratified by the stockholders thereof at a meeting held in December, 1881.

The New Orleans Pacific Railway Company was originally incorporated under the general laws of the State of Louisiana in June, 1875. Its charter was subsequently amended by acts of the Louisiana Legislature passed February 19, 1876, and February 5, 1878. It is thereby authorized to construct a railroad "beginning at a point on the Mississippi River at New Orleans, or between New Orleans

and the Parish of Iberville, on the right bank of the Mississippi, and Baton Rouge, on the left bank, &c., or from any point within the limits of this State, and running thence toward and to the City of Shreveport," which is made its northwestern terminus.

The route of this company as projected is understood to extend from New Orleans to Baton Rouge, and thence, by way of Alexandria, to Shreveport. Between New Orleans and Baton Rouge it lies on the west side of the Mississippi River, while the designated route of the New Orleans, Baton Rouge and Vicksburg Railroad Company, between the same points, lies on the east side of that river. Between Baton Rouge and Shreveport its general course and direction corresponds, in the main, with the route designated by the last-named company. It is throughout its entire length from New Orleans to Shreveport within the limits of the before-mentioned withdrawals of public lands.

In October, 1881, the President of the New Orleans Pacific Railway Company made affidavit that three sections of its road were then completed and ready for examination by the Government; whereupon, a commissioner was appointed to examine the same, the result of whose examination appears in a report made by him to the Secretary of the Interior, under date of the 26th of that month. One of the sections embraces 68 miles of road, beginning on the west bank of the Mississippi River, opposite New Orleans, and ending near the town of Donaldsonville; another embraces 20 miles of road near Alexandria, and the third embraces 50 miles of road terminating at Shreveport. For each of these sections lands are claimed by that company under the aforesaid land grants as assignee of the New Orleans, Baton Rouge and Vicksburg Railroad Company.

No map of definite location of any portion of its road has been filed other than those of constructed portions.

It appears that in February, 1881, the New Orleans Pacific Railway Company purchased from Morgan's Louisiana and Texas Railroad and Steamship Company the road constructed on the west bank of the Mississippi River by the New Orleans, Mobile and Texas Railroad Company,

from Westmego to White Castle, a distance of 68 miles and that the same has become a part of the main line of the road of the New Orleans Pacific Railway Company.

The following are the questions submitted:

"1. Was the grant to the New Orleans, Baton Rouge and Vicksburg Railroad Company a grant in praesenti?

"2. Had the New Orleans, Baton Rouge and Vicksburg Railroad Company, at the date of its alleged transfer of lands to the New Orleans Pacific Railway Company, such an interest in the lands, under said act, as was assignable?

"3. Is the New Orleans Pacific Railway Company such a successor to or assignee of the New Orleans, Baton Rouge and Vicksburg Railroad Company as is contemplated by said act?

"4. Should it appear that the 68 miles of the New Orleans, Mobile and Texas Railroad was constructed prior to the act of March 3, 1871, granting lands to AID IN THE CONSTRUCTION of the New Orleans, Baton Rouge and Vicksburg Railroad, can the New Orleans Pacific Company (its assignee) claim any benefit from the grant? Or, in case of such prior construction, and the nonconstruction of any portion of the New Orleans, Baton Rouge and Vicksburg road, has the purpose for which the grant was made failed and the grant consequently lapsed?

"5. If the New Orleans, Mobile and Texas road was constructed subsequently to the date of said act, is so much of its road as is now owned by the New Orleans Pacific Company such a road as is contemplated by the President within the meaning of said act, and may patents issue to the latter for lands opposite to and coterminous with such constructed portion of road?

These questions are accompanied by a request for an opinion upon such other questions of law as may suggest themselves touching the transfer of said land grant, to which reference is above made.

68 Of the above-stated questions the first three may be considered together, in connection with the

following inquiry which presents itself at the outset, whether the assent of Congress to the transfer made by the New Orleans, Baton Rouge and Vicksburg Railroad Company of all its interest in said land grant to the New Orleans Pacific Railway Company is necessary (by reason of anything in the provisions of the grant itself) to entitle the latter company to the benefit of said grant in aid of the construction of the road projected by it.

The act of March 3, 1871, passed to the New Orleans, Baton Rouge and Vicksburg Railroad Company, a present interest in a certain number of alternate sections of public lands per mile within the limits there prescribed. Its language is "There is hereby granted to said company" the number of alternate sections mentioned; words which import a grant in PRAESENTI, and not one IN FUTURO, or the promise of a grant. (97 U. S. S. Rep., 496.) But the grant thus made is in the nature of a float. It is of sections to be afterwards located, their location depending upon the establishment of the line of the road. Until this definitely fixed the grant does not attach to any specific tracts of lands. Upon the line of the road being definitely located the grant then first acquires precision, and the company becomes invested with an inchoate title to the particular lands covered thereby, which can ripen into a perfect title only as the construction of each section of 20 miles of road is completed and approved, when the right to patents for the lands opposite to and coterminous with such constructed section accrues.

The PROVISO in the grant that the company shall complete the whole of its road within five years from the date of the act is a condition subsequent, the failure to perform which does not ipso facto work a forfeiture of the grant, but only gives rise to a right in the Government to enforce a forfeiture thereof. Yet, in order to enforce a forfeiture such right must be asserted by a judicial proceeding, authorized by law, or by some legislative action amounting to a resumption of the grant. (Schulenberg vs. Harriman, 21 Wall., 44.) Hence, until advantage is taken of the non-performance of the condition, under legislative

authority, the interest of the grantee in the grant remains unimpaired thereby.

Such being the nature and effect of the grant and its accompanying condition, and no action having been taken either by legislation or judicial proceedings to enforce a forfeiture thereof, it follows that at the period of said transfer by the New Orleans, Baton Rouge and Vicksburg Railroad Company this company was invested with a present interest in the number of alternate sections of public lands per mile granted by the act of 1871, notwithstanding it was already in default in the performance of the condition referred to, and that it still retained a right to proceed with the construction of the road in aid of which the grant was made until advantage should be taken of the default. Put as it had not then definitely fixed the line of its road, although a map designating the general route thereof was duly filed, that interest did not attach to any specific tracts of land, but remained afloat, as it were, needing a definite location of the road before it could become thus attached. Was the interest here described assignable to another company, so as to entitle the latter to the benefit of the grant in aid of the construction of its road between the places named therein, without the assent of Congress?

Doubt has perhaps arisen on this point in view of the fact that in one or two instances it has been thought expedient to obtain legislation by Congress confirming or authorizing a similar assignment (see Section 2 of the Act of March 3, 1865, chapter 88, and Section 1 of the Act of March 3, 1869, chapter 127), and also in view of the adverse ruling of this Department in the case of the Oregon Central Railroad Company. (13 Opin., 382.) However, a similar assignment made in 1866 by the Hannibal and Saint Joseph Railroad Company to the Pike's Peak Railroad Company, afterward known as the Central Branch Company, was held to be valid by Attorney General Stanbery in an opinion given to the Secretary of the Treasury under date of July 25, 1866.

In the latter case the Hannibal and Saint Joseph Company, which was incorporated by the State of Missouri, with

authority to construct a railroad between Hannibal and Saint Joseph, within that State, was, by the Pacific railroad act of July 1, 1862 (Section 13), authorized to "extend its road from Saint Joseph, via Atchison, to connect with the road through Kansas * * * and may for this purpose use any railroad charter which has been or may be granted by the Legislature of Kansas," &c., and by the fifteenth section of the same act it was provided that "wherever the word company is used in this act it shall be construed to embrace the words their associates, successors and assigns,

the same as if the words had been properly added
69 thereto. Subsequently, in 1863, an assignment

was made by that company of all its rights under said act (which included an interest in both a land and a bond subsidy) to the Atchison and Pike's Peak Railroad Company, a company previously organized under a charter granted by the Legislature of Kansas. The latter company having constructed a section of 20 miles of the proposed road west from Atchison claimed the benefit of the grant made to the Hannibal and Saint Joseph Company, as its assignee, and this claim was recognized and allowed, in accordance with the opinion of the Attorney General. It will be observed, however, that the Hannibal and Saint Joseph Company was authorized to "use any railroad charter which has been or may be granted by the Legislature of Kansas," and this, together with the provision in the fifteenth section quoted above, may have been regarded as sufficient to sustain the assignment.

In the case of the Oregon Central Railroad Company, mentioned above, a grant of a right of way through the public lands, and also of alternate sections thereof, was made to that company, "and to their successors and assigns", by the Act of May 4, 1870, chapter 69, for the purpose of aiding in the construction of a railroad and telegraph line between certain places in Oregon. In August following an instrument was executed by the company assigning all its interest in the grant of the Willamette Valley Railroad Company, and thereupon the question arose whether the grant was susceptible of being thus transferred. The At-

torney General (Mr. Akerman, to whom the question was submitted, after reviewing the various provisions of the act, some of which (see section 5) imposed certain duties and required certain important acts to be performed by the company, decided in the negative holding that, upon consideration of those provisions, the Oregon Central Company was alone within the contemplation of Congress in respect of the donation made and duties imposed by that act. The words, "their successors and assigns", as used in the act, were regarded as words of limitation merely.

But the grounds upon which that decision appears to have been based are not found to exist in the case now under consideration. Here a grant of a certain number of alternate sections of public lands per mile is made to the New Orleans, Baton Rouge and Vicksburg Railroad Company, its successors and assigns, in aid of the construction of a road from New Orleans, by the route indicated, to connect with the Eastern Terminus of the Texas and Pacific Railroad, which lands are required to be "withdrawn from the market, selected, and patents issued therefor, and opened for settlement and pre-emption upon the same terms and in the same manner and time as is provided for and required from said Texas Pacific Railroad Company." The grant is coupled with no special duties or trusts, for the performance of which there is reason to believe the particular company named therein was more acceptable to Congress than any other. Its purpose is to secure the construction of a railroad between the points designated, and whether this purpose be fulfilled by that company or by another company must be deemed unimportant in the absence of any provision indicative of the contrary. The interest derived by the grantee, though it remain only afloat, is a vested interest, and it is held under the same limitations which apply after it develops into an estate in particular lands until extinguished by forfeiture for nonperformance of the condition annexed to the grant. I perceive no legal obstacle arising out of the grant itself to a transfer of such interest by the grantee to another company, and should the latter construct the road contemplated agreeably to the

requirements of the grant, and thus accomplish the end which Congress had in view, I submit that it would clearly be entitled to the benefits thereof.

The question of the assignability of the interest of this grantee would be more difficult if, after definitely locating the line of its road, and thus attaching the grant to particular lands along the same, it was proposed to transfer that interest to another company for the benefit of a road to be constructed by the latter on a different line, though following the general course of the other road. But in the present case the facts give rise to no such difficulty. The grant had not previous to the transfer become thus identified with a particular line of road, and was thereafter susceptible of location upon the line of the road projected by the Assignee (the New Orleans Pacific Company), provided this road met the requirements of the grant in other respects, as to which no doubt is suggested.

My conclusion is that the assent of Congress to the assignment made by the New Orleans, Baton Rouge and Vicksburg Railroad Company as above, is not necessary in order to entitle the assignee to the benefit of the land grant in question.

The remaining questions relate to the 68 miles of railroad formerly belonging to the New Orleans, Mobile and Texas Railroad Company, but now owned by the New Orleans Pacific Company, and made a part of its main line between New Orleans and Baton Rouge.

70 The land grant in question was, as its language imports, made in AID OF THE CONSTRUCTION of a railroad between certain termini, contemplating a road to be constructed, not one already constructed. It has not been the policy of Congress thus to aid constructed roads. Had a constructed road existed at the date of the grant, which extended from one terminus to the other, and afterwards the New Orleans, Baton Rouge and Vicksburg Railroad Company, instead of entering upon and completing the construction of a road, had purchased the road already constructed, this, it seems to me, would not have satisfied the purposes of the grant so as to entitle the company to the

benefit thereof. The same objection would apply were the constructed road extended over only a part of the route contemplated by the grant. So far as I am advised, the action of the Government hitherto has accorded with this view. On the other hand, if such road was constructed subsequently to the date of the grant, and is owned by the grantee or the assignee of the latter, I see no ground for excluding it from the benefit of the grant should it otherwise fulfill the requirements thereof.

Agreeably to the foregoing views, and in direct response to the several questions submitted, I have the honor to reply as follows: The first, second and third questions I answer in the affirmative. The fourth question (including the alternative added thereto) I answer in the negative. The fifth question I answer in the affirmative—assuming, as I do, the company named therein to be an assignee of the grantee in the act referred to.

I have the honor to be, very respectfully,

BENJAMIN HARRIS BREWSTER.
Attorney General.

Hon. H. M. Teller,
Secretary of the Interior.

In support of the views of the Senate and House committees, the Attorney General of the United States, and of your present committee, we refer the House to the following authorities as bearing especially on this subject: Ludlow v. New York and Harlem Railroad Company (12th Barbour's Report, page 440); People of Vermont v. The Society, &c. (2d Payne's Report, page 562); Willard v. Alcott (2d New Hampshire); Chalker v. Chalker (1st Connecticut); Hume v. Kent, and Andrews v. Suiter (32 Maine); Murray's lessees et al. v. Hoboken Land and Improvement Company (18 Howard, 280); Cooley's Constitutional Law (page 69); Lyttle v. State of Arkansas (9th Howard, 383); United States v. Arredendo (5 Peters, 691). Many other cases could be cited, but we deem the above sufficient.

Your committee are of the further opinion that the whole grant to the New Orleans, Baton Rouge and Vicks-

burg Railway Company has not been earned. The road contemplated to be built on the east side of the river has not been built on either side of the river by the original or the assignee company. The grand purpose of the legislature of Louisiana and of the United States in all the legislation to which we have referred was to connect New Orleans with the Texas and Pacific system, and to induce the building of a railroad that would bring about this result. The grant, as contained in the twenty-second section of the charter of the Texas and Pacific Railroad Company, was made. The Congress of the United States did not contemplate the buying of railroads to make this connection, but the building of them; and no grant could or should inure to a road which was built by another company and purchased by the New Orleans and Pacific Railway Company. Your committee do not agree that this is a fulfillment of the terms on which the grant is to be earned.

The New Orleans and Pacific Railway Company, instead of building a railroad from New Orleans to Shreveport or the eastern terminus of the Texas Pacific system, as contemplated by the legislature of Louisiana, or the Congress of the United States, purchased a line of railroad from New Orleans to White Castle, a distance of 68 miles. This line of railroad was purchased from the Morgan and Louisiana railroad system. The land withdrawn from entry by the order of the Interior Department, dated February 13, 1873, lying coterminous with this part of the road should, in the opinion of your committee, be forfeited and restored to the public domain. The New Orleans and Pacific Company do not claim any land lying coterminous with this part of this road, and in obedience to the views of the Attorney General and of the Interior Department, as set out in opinions hereinbefore recited, they have filed in the Department of the Interior the following disclaimer by their attorney, John F. Dillon:

In the matter of the application of the New Orleans Pacific Railway Company as assignee and grantee of the New Orleans, Baton Rouge and Vicksburg Railroad Com-

pany, for the approval of the report of the Commissioner to examine the road constructed by the former company and for the issue of patents under Section 22 of the Act of March 3, 1871.

Now comes the said New Orleans Pacific Railway Company and states that it claims as the assignee and grantee
 71 of said NEW ORLEANS BATON ROUGE AND VICKSBURG Railroad Company, the benefit of the grant of lands made by Section 22 of the Act of March 3, 1871, to said last-named company, as shown by documentary and record evidence on file in the office of the Secretary of the Interior; it also states that it has built and has in operation a road from New Orleans to Shreveport; that about 68 miles of said line of road extending from New Orleans to White Castle was acquired from another company and put in repair by the New Orleans Pacific Railway Company, and the said New Orleans Pacific Railway Company hereby disclaims any right to receive land under the said Section 22 of the Act of March 3, 1871, in respect of the said 68 miles of railroad extending from New Orleans to White Castle, but claims and insists that it is entitled to the lands granted by said Section 22 for and in respect of all of the rest and residue of the line of railway built by it extending from White Castle to Shreveport, with a branch or spur to Baton Rouge.

Dated and signed this 19th day of October, A. D. 1882.

NEW ORLEANS PACIFIC RAILWAY COMPANY,
 By JOHN F. DILLON,
 ITS ATTORNEY.

At a meeting of the board of directors of said company held November 10, 1882, this action of their attorney was ratified and approved.

The Blanchard-Robertson agreement, made with the New Orleans Pacific Company originated from a protest filed by Hons. E. W. Robertson and N. C. Blanchard, Members of Congress from the State of Louisiana, with the Interior Department, requesting the holding up the action of

said department in patenting lands to said company until some arrangement could be made by them with said company looking to the protection of the settlers on the land in the limits of the grant. Said protest is as follows:

SIR: Referring to our interview a few evenings since with yourself, relative to the land grant claimed in Louisiana by the New Orleans Pacific Railroad Company, we hereby formally ask that further action by your department towards recognizing the said land grant as existing in favor of any party or parties be deferred for the present, and until such further action can be taken by us as will conserve the rights and interests of the people most vitally interested, viz, those living in the country in which the grant lies, and included within the limits of the fourth and sixth congressional districts of Louisiana, now represented by us.

In support of this request, we submit the following, viz:

1. A large portion of the land embraced in the grant above referred to was, by an Act of Congress passed in 1856, donated to another railroad company. Prior to 1856, many persons had settled upon this land preparatory to the entry and purchase of the same from the Government. These parties were settlers in good faith, and if the time is given us, a list of their names and the extent of their claims can be furnished. Between the year 1856 and that of 1871, a great many more persons settled upon said lands. In the meantime, somewhere about the year 1870, the original grant to the railroad company in 1856 was, by act of Congress, declared forfeited. Upon this declaration of forfeiture, the parties who had settled on the land became entitled to file their applications for entry and purchase. But before this could be done, a grant covering the land, was made by the act of Congress approved March 3, 1871, to the New Orleans, Baton Rouge and Vicksburg Railroad Company, and under this grant the land, something over a million acres, was withdrawn from the market.

We think these parties, who had, under the circum-

stances above enumerated, settled on the land, are settlers in good faith, and have legal rights that should be protected.

We ask for time to present more fully the case of these settlers, and to produce their names, extent of their claims, &c.

2. Many of the parties who had settled on this land up to 1871, could not make application for the entry and purchase of the land, for the reason that a large part of the land, up to that time, had not been surveyed by the Government so as to designate the sections, townships, and ranges in which were situated the different tracts of land settled upon—the necessity for which surveys and resurveys is shown by the reports of the Commissioner of the General Land Office, made repeatedly to Congress, and asking for adequate appropriations for surveys and resurveys declared to be necessary in order to enable settlers to locate their claims, and the Government to dispose of the lands. By the failure of Congress to make these adequate appropriations the surveys and resurveys have never been completed, and hence the rights of these settlers have remained in abeyance, and would now be entirely lost by the issuance of patents to cover the land included in the grant made to the New Orleans, Baton Rouge and Vicksburg Railroad Company.

72 Reserving the right to file additional and supplemental reasons and protests, we are,
Respectfully, &c.,

E. W. ROBERTSON
M. C., Sixth District, Louisiana.
N. C. BLANCHARD
M. C., Fourth District, Louisiana.

HON. SECRETARY OF THE INTERIOR.

An agreement, known as the Blanchard and Robertson agreement, was consummated, and is contained in a communication addressed to Messrs. Blanchard and Robertson by the New Orleans Pacific Railway Company, through its

President, E. B. Wheelock, on January 4, 1882. Said communication is here inserted.

Washington, January 4, 1882.

Gentlemen: In consideration of the withdrawal by you of the protest and objection filed by you with the Department of the Interior against the recognition of the claims urged by the New Orleans, Pacific Railway Company to the land grant made by the New Orleans, Baton Rouge and Vicksburg Railroad Company by the act of Congress of 1871, and now claimed by the New Orleans Pacific Company, transferees of the New Orleans, Baton Rouge and Vicksburg Company, on behalf of the said New Orleans Pacific Company and any other railroad association or combination with which the said New Orleans Pacific Company is connected, I hereby agree, consent, and obligate myself and the said company and any other company or association connected with it that the right of settlers and occupiers on the land included within the limits of said grant shall be recognized and protected as follows, to-wit:

Settlers and occupiers of any of the lands aforesaid up to this date shall be given the right within twelve months from the register of the patents issued by the Government to the said company or its transferees for said lands, in the office of the clerk of the district court and ex-officio recorder of conveyance and mortgages of the parish where the land wanted by such settlers or occupiers is situated, to file their applications with the railroad company, through agents to be designated by the company for the purpose, for the land claimed or wanted by them; such settlers or occupiers shall at the time the title deeds are issued to them, pay one-third in cash of the price of the land so occupied or settled by them, and shall have one and two years from that time, with 6 per cent interest, in which to pay the remainder, mortgage and vendor's privilege to be retained by the company.

The price of land to be paid by such settlers or occu-

piers shall not exceed \$2 per acre, and the quantity of land to be claimed by each shall not exceed 160 acres.

Immediately upon the register of the patents in the office of the recorder of mortgages of the Parishes affected by the land grant, the railroad company shall give notice by publication for ten days in a newspaper in the Parish where any settlers or occupiers live, and also by publication at the courthouse door of such Parish, the fact of the register of patents, and that the company is ready to receive application from settlers and occupiers for the land wanted by them, and indicating the place where, and person to whom, application should be made.

Should this notice not be given immediately upon the register of the ptaents, these settlers and occupiers are to have twelve months in which to file their application from the time of the giving of such notice aforesaid. Proof of occupancy shall be the same as required by the laws of the United States for the acquisition of public lands, if required by the company.

E. B. WHEELOCK

President New Orleans Pacific Railway Company.

Hons. E. W. Robertson and N. C. Blanchard,

Representatives in Congress from Louisiana.

Accepted on behalf of settlers and occupiers.

E. W. ROBERTSON,

Member of Congress, Sixth District of Louisiana.

N. C. BLANCHARD,

Member of Congress, Fourth District of Louisiana.

73 This proposition was accepted by said Blanchard and Robertson in behalf of the people who had settled on said granted lands by letter addressed to the Department of the Interior, dated January 4, 1882. Said letter is as follows:

Washington, January 4, 1882.

Sir: We hereby withdraw the opposition and protest filed by us to the recognition of the New Orleans Pacific

Railroad Company as the grantees and transferees of the land in Louisiana granted by the Act of Congress of 1871 to the New Orleans, Baton Rouge and Vicksburg Railroad Company, and claimed by said New Orleans Pacific Company as transferees of the New Orleans, Baton Rouge and Vicksburg Company.

The object we had in filing said protest was the protection of the rights of settlers on the land covered by said grant, and as that has been obtained by agreement with the company, we do not wish to throw any further obstacle in the way of the recognition by the Department of the Interior of the rights claimed by the company.

The New Orleans Pacific Company have constructed the road running through the grant—that is to say, from New Orleans to Shreveport—and having obtained the funds with which to do so upon the faith of its right to the land grant, we think that justice demands the recognition of their claims to the land.

We are, sir, with great respect, your obedient servants.

E. W. ROBERTSON,
Member of Congress, Sixth District of Louisiana.

N. C. BLANCHARD,
Member of Congress, Fourth District of Louisiana.

THE SECRETARY OF THE INTERIOR.

This agreement has been fully acquiesced in by the General Land Office, the railroad company and the settlers, and has been the basis of all settlements made to adjust the troubles arising out of conflicting interests since it was adopted.

From the view of all the facts and authorities referred to, your committee concludes—

(1) That all that part of the grant made to the New Orleans, Baton Rouge and Vicksburg Railroad Company embraced in the 22d Section of the charter creating the Texas and Pacific Railroad Company, situate on the east

side of the Mississippi River, and that part situate on the west side of said river, which is opposite to and coterminous with the part of the New Orleans Pacific Railroad Company which was completed on the 5th day of January, 1881, should be forfeited and be restored to the public domain.

(2) That all the remainder of said grant should be confirmed, granted and conveyed unto said New Orleans and Pacific Railroad Company, said lands to be determined and located in accordance with the map filed by said New Orleans, Baton Rouge and Vicksburg Railroad Company in the Department of the Interior, which indicates the line of said railroad. This confirmation of title should take effect when said company has accepted the provision of this act and done each and every duty and obligation imposed on them or their assignor by law.

(3) That the Blanchard-Robertson agreement should be confirmed and adhered to in the settlement of all conflicting rights between the said company and the settlers on said land.

The bill under consideration represents the view of your committee on all these propositions, and we recommend its passage.

74 In the District Court of the United States
 for the Western District of Louisiana.

No. 947 In Equity.

UNITED STATES OF AMERICA,
vs.
NEW ORLEANS PACIFIC RAILWAY COMPANY,
W. R. PICKERING LUMBER COMPANY,
and
SOUTHLAND LUMBER COMPANY.

Evidence taken at Shreveport, Louisiana, August 4, 1915, out of court by consent.

Appearance for the Government:

Geo. Whitfield Jack,
United States Attorney.

Robert A. Hunter,
Assistant United States Attorney.

Appearances for defendants:

Fred. G. Hudson,
for New Orleans Pacific Railway Company.

Judge J. G. Palmer,
for W. R. Pickering Lumber Company.

James R. Monk,
for Southland Lumber Company.

The evidence being taken out of court, is taken subject to objection of all parties which may be offered to the materiality or relevancy of the evidence.

Mr. Hunter, for the Government, offers, introduces and asks to be filed in evidence: Resolution adopted at a meeting of the stockholders of the New Orleans Pacific Railway Company accepting the provisions of the Act of Congress of February 8, 1887, which resolution is filed by reference, and it is agreed that the same may be copied by the Clerk of Court from the printed report of the hearings before the Committee on Public Lands in the House of Representatives on H. R. 5890 of date January 26 and 27, 1914. Said resolution appearing on pages 28 and 29 of said hearing. And marked Government's exhibit A.

Counsel for the Government offers, introduces and files in evidence: Agreement of the New Orleans Pacific Railway Company to reconvey lands, dated August 3, 1892,

ment from page 30 of the printed record of said hearing above referred to. Marked Government's exhibit B.

OBJECTION: This is objected to by both defendants on the ground that the said resolution would have no retroactive effect, it having been adopted long after the New Orleans Pacific Railway Company sold the lands in question.

Counsel for the Government offers, introduces and files in evidence: Copy of the Land Office Record relating to the homestead entry and contest between Stephen N. Grant and the New Orleans Pacific Railway Company. Marked Government's Exhibit C.

Counsel for the Government offers, introduces and files in evidence: Bill of the Government and exhibits thereto attached in suit of the United States versus New Orleans Pacific Railway Company et als No. 15 in equity on the docket of this court, subpoena to the New Orleans Pacific Railway Company, and all pleadings filed in said suit by the New Orleans Pacific Railway Company and decrees of the court thereon, as follows: Marked Government's exhibits D-1 et seq.

D-1 Bill in equity filed February 27, 1901. Including order for appearance of non-resident defendants, and list of lands patent to which the Government asked the cancellation in so far as it covers the lands in controversy in this suit.

D-2. Subpoena in chancery, of date February 27, 1901, to Robert Strong, Vice-President, and Charles M. Greene, Receiver, with return thereon showing service February 28, 1901.

D-3. Certified copy of appearance of Charles M. Greene, Receiver of the New Orleans Pacific Railway Company. Filed March 28, 1901.

D-4. Minutes of May 25, 1903, showing order for supplemental process.

D-5. Order of court and return of service on Charles M. Greene. Filed June 30, 1903.

D-6. Certified copy of order of court issued to Robert Strong, and return of service. Filed June 30, 1903.

D-7. Copy of motion to vacate and annul process issued. Filed September 25, 1903.

D-8. Copy of original order of court to appear and answer. Filed May 25, 1904.

D-9. Copy of order of court issued to Robert Strong, and Marshal's return. Filed June 8, 1904.

D-10. Order of court issued to Charles M. Greene, and marshal's return. Filed June 21, 1904.

D-11. Appearance of New Orleans Pacific Railway Company et als of June 26, 1904.

D-12. Demurrer of New Orleans Pacific Railway Company of August 26, 1904.

D-13. Amended Demurrer of New Orleans Pacific Railway Company. Filed October 24, 1904.

D-14. Decree overruling demurrer and sustaining bill of complaint and assigning defendants to answer. Filed March 17, 1905.

D-15. Plea of New Orleans Pacific Railway Company. Filed May 22, 1905.

D-16. Replication to plea of New Orleans Pacific Railway Company. Filed February 19, 1906.

D-17. Motion to strike out plea of prescription.

D-18. Minutes of court of November 6, 1913, showing reference to plea to merits.

D-19. Answer of New Orleans Pacific Railway Company. Filed December 16, 1913.

OBJECTION. Counsel for defendants W. R. Pickering Lumber Company and Southland Lumber Company object to the introduction in evidence of these papers from the record of equity Suit No. 16 as immaterial, incompetent and irrelevant, in this, to-wit:

(1) That the said documents have no tendency to prove any fact alleged in any of the pleadings filed herein.

(2) That they have no tendency to show any right in any of the parties.

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(3) That they, as to the defendants W. R. Pickering Lumber Company and Southland Lumber Company, are res inter alias acta. The said two defendants not having been a party to equity suit No. 16, and the lands involved in this case being at the time of the filing of suit No. 16 the property of parties who were not parties to the record in equity Suit No. 16.

Counsel for the Government offers, introduces and files in evidence: Letter from H. L. Muldrow, Acting Secretary, of June 6, 1887, to Registers and Receivers (5th Land Decisions, 686) to be copied therefrom. Marked Government's Exhibit N.

Counsel for the Government offers, introduces and files in evidence: Letter from the Commissioner General Land Office dated February 13, 1889, to the Registers and Receivers of the General Land Office, to be copied from 8th Land Decisions.

OBJECTION: This is objected to by defendants on the ground that it is immaterial, irrelevant, res inter acta, that the act itself is the best evidence of what it contains, and that the interpretation that may have been put on that act by S. M. Stockslager, Commissioner, is incompetent when the Act itself is already in evidence before the court.

Counsel for the Government offers, introduces and files in evidence: Map made by James W. Neal and Elzie Stokes showing cultivation, clearings, improvements, etc. on the land in question. Marked Government's exhibit G.

It is admitted by counsel for plaintiff and defendants that the map made by Mr. Neal and Mr. Stokes (marked Government's Exhibit G) is a true and correct map and rep-

resents the improvements and cleared land upon the property in controversy.

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MR. THOMAS J. KILLEEN, witness called in behalf of plaintiff and intervenor, being first duly sworn, testified as follows:

By Mr. Hunter:—

Q. Your name is Thomas J. Killen? A. Yes, sir.

Q. Where do you live, Mr. Killen? A. In Shelby County, Texas.

Q. Where were you born? A. In Jackson County, Mississippi.

Q. You are a citizen of the United States? A. I am.

Q. How old are you? A. 63, on the 23rd day of this past month.

Q. How long have you been living in Texas? A. 19 years.

Q. Did you ever live in Louisiana? A. Yes, sir.

Q. Are you familiar with the tract of land in controversy in this suit? A. I suppose so; yes, sir.

Q. Did you ever live on the land claimed by Mr. Stephen N. Grant? Claimed by Mr. Grant as his homestead? A. I did.

Q. Are you familiar with the tract of land on which Mr. Stephen N. Grant is living? A. Yes.

Q. How long has it been since you say that tract of land? A. Since I saw that tract of land the last time?

Q. Yes? A. That has been some 16 or 17 years, since I saw it last.

Q. I will ask you to state whether or not you are familiar with the numbers and description of the tract of land embraced in this suit? A. I used to be, I do not know whether I know right now. I do not know as I could call it off and so on. I used to be familiar with it, but a man will let things like that slip him in the course of years, you know.

Q. You are familiar with the tract of land Stephen N. Grant resided upon when you saw that tract 16 or 17 years ago? A. Yes, sir.

Q. Do you know what parish that land is situated in?

A. Vernon.

Q. Do you know how Mr. Grant came to live on that land?

OBJECTION: Counsel for defendants object to any evidence as to settlement, occupation, etc. of the land involved in this suit for the following reasons:

(1) That as evidence of adverse possession it is incompetent, irrelevant and immaterial, since:

- (a) No one can prescribe against the United States; nor
- (b) Against a grantee of the United States until after issue of patent.
- (c) Inasmuch as the patent issued less than 30 years ago, there can, under the Louisiana law, be no prescription.

(2) That as evidence in impeachment of the patent or to show its invalidity it is incompetent, irrelevant and immaterial, because:

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- (a) The relative rights of the United States and its grantees and of the defendants are to be determined by the records of the United States, and not by evidence of occupation prior to the patent by the United States government to the New Orleans Pacific Railway Company.
- (b) Notice and claim on the records of the United States is essential to give claimant a right as against a grant or conveyance subsequent to the initiation of the claimant's occupation.
- (c) Plaintiff and intervenor cannot attack a United States patent collaterally, nor at all without first show-

ing a statutory right in themselves, and in this case it is contended by defendants that the United States government is merely a nominal party to this suit, and has no right or interest to prosecute same.

- (d) The evidence does not tend to show that the patent is void on its face, or that it was issued without authority.
- (e) The approval of the list and issuing of a patent is an adjudication that the land was not in the possession of the parties within the proviso of the act of February 8, 1887.

This objection to be made general, as to all witnesses.

A. Yes, sir.

Q. Just explain how? A. I let him have it, myself. Homestead and claim. Ah, improvements and claim.

Q. Did you sell him your claim and improvements on this tract of land? A. I did.

Q. When did you make that sale to him? A. In 1885.

Q. Do you remember the consideration of the sale?

A. No.

Q. Do you remember what he gave you in payment?

A. No. Just naturally slipped my memory.

Q. You do not recall it? A. No. Only that I sold it to him, and that he paid me for it, but now as to what he paid me, that has just slipped my memory.

Q. Were you living on the land at the time you made this sale to Mr. Stephen N. Grant? A. Yes, sir.

Q. How long had you been living on it at that time?

A. Well, I lived on the tract of land twice. The last time 4 years, and the first time 4 years. But I left it one year during that 8 years.

Q. When did you first settle on this tract of land?

A. I commenced in the fall of 1876, and moved there in January of 1877.

Q. What did you do in the fall of 1876 in the way of settlement? A. Well, I built a house, and barns, etc. and so on. Enough to move on and have conveniences around to live. Smoke house, etc.

Q. Put any land in cultivation in 1876? A. No.

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Q. When did you move upon the tract of land? A. In January of 1877, if I mistake not.

Q. At that time, in 1876 and 1877, when you moved on the land, were you the head of a family? A. I was.

Q. You were married. A. I was.

Q. Did you have any children? A. Yes, sir; three.

Q. How old were you? A. Somewhere about 25.

Q. When were you born? A. In 1852.

Q. Did you establish a residence on this land in 1877? Yes, sir; in January of 1877.

Q. Did you move on it with your wife and family? A. Yes.

Q. Did you at that time own any other land? A. No.

Q. What was your intention relative to this land when you moved on it? A. My intention was to have it as a home. Of course, I aimed to save it when everything opened up, but at that time people did not care whether they had a deed to land or not. It was a free country.

Q. Did you intend to homestead the tract? A. Yes, sir.

Q. Now, you say that you moved on this tract of land in 1877. How long did you stay on it? A. Four years.

Q. Did you make any sale of your tract of land and improvements? A. Yes, sir.

Q. To whom did you sell it? A. Jack Conerly.

Q. Do you remember the price of the sale? A. Yes, sir; \$200. He did not pay it all down, but that was the consideration.

Q. Did he pay any part of the price? A. Yes, sir; about half, in trade.

Q. When did you make this trade with Jack Conerly? A. In the fall of 1880.

Q. Did Conerly move on the land immediately? A.
Yes, sir.

Q. Did he move on the land in 1880 or 1881? A.
Well, I do not really know, but I think he moved on the
land in December of 1880. Of course, you see that has been
such a long time ago.

Q. Did you move off the land at the time Conerly
moved on? A. Yes.

Q. Was there any interval between the time you moved
off and he moved on? A. Not to amount to anything.
Might have been a few days. We were both moving at the
same time, one was moving in and the other was moving out.

Q. Were you well acquainted with Conerly? A. Tol-
ably well acquainted. I had known him for 3 or 4 years.

Q. Was he, at the time he moved on the land, the head
of a family? A. He was.

Q. He moved on it with his wife and family? A.
Yes, sir.

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Q. Do you remember how old he was at that time?
A. No, sir.

Q. Where is Conerly now? A. Dead. So I have
been told. He moved to Lake Charles, and I have since
heard that he is dead.

Q. How long did Conerly remain on the land? A. I
do not think quite a year.

Q. He moved off? A. In the fall of 1881.

Q. Did you take the place back? A. I did.

Q. Did you return him the cash payment he had made
you? A. Yes, sir; just the same thing.

Q. And he transferred the place back to you? A.
Yes.

Q. That was a verbal trade? A. Yes, sir; no writ-
ing.

Q. You say Conerly moved off in 1881? And did you
move back on the place in the fall of 1881? A. Yes, sir.

Q. State whether or not there was any interval of
time between the time that Conerly moved off of the land

and the time you moved on? A. Well, just like on the other trade. Well, as my mind serves me now, as he moved out I moved on. There might have been a few days, probably a week. I do not remember exactly. But I know it was but a short time, if there was any.

Q. If there was any interval at all, it was only for a short time. A. Yes, sir.

Q. Now, before you moved back on the place with your family, did you move any of your property to the place? A. Well, I do not remember just exactly what I moved first. Whether my family or other stuff or not. I just moved, you know, I do not remember.

Q. Well, you moved back on the place, then. Took it back from Conerly, and moved back in the fall of 1881?

A. Yes, sir.

Q. How long after that did you remain on the place? A. Four more years.

Q. Until what year? A. 1885.

Q. What did you then do with the place? A.

OBJECTION: Counsel for the defendants object to this testimony for the reason that title to real estate or to realty by destination can only be established by written evidence, and not by parol. This objection to stand as a general objection against all similar testimony.

A. I let Stephen N. Grant have it.

Q. What did you let Stephen N. Grant have? A. I let him have the improvements and the claim.

Q. I believe you stated that you did not remember the consideration of the trade? A. No, sir; I do not remember the consideration that Grant gave me. I remember what Conerly gave me, that is all.

Q. Did you move off this tract of land when you made the trade with Mr. Grant? A. I did.

Q. Did Mr. Grant move on immediately? A. Pretty soon; yes, sir. There was no interval to amount to anything. Of course, I could testify that it was immediately.

Q. Was there any interval of time between the time that you moved off, and the time that Grant moved on?

A. No, sir.

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Q. Where did you go when you moved off this place?

A. I bought another place from that man there, Bagents.

Q. How far is that place from the land in the suit here? A. About 2 miles.

Q. Did you live there? A. I did.

Q. How long? A. Two years.

Q. Did you keep up with the Grant place? A. Yes, sir.

Q. Did you visit Mr. Grant? A. Oh, yes.

Q. State how much of the land you put into cultivation on this tract? A. I did not measure it, but somewhere between 20 and 30 acres.

Q. When I refer to the tract of land, I mean the tract of land in controversy in this case? A. That is the way I taken it.

Q. You state 20 or 30 acres? A. Yes, sir; somewhere between 20 and 30 acres.

Q. How much land did you put in cultivation between the year 1877 and 1880, when you made the trade with Conerly? A. All that was ever in cultivation.

Q. When you made the trade with Conerly you had in cultivation all of the land that was in cultivation when you sold to Grant? A. Yes, sir.

IT IS ADMITTED by counsel for defendants that Thomas J. Killen commenced cultivating the land in the southeast quarter of the northwest quarter of the tract in controversy in the year 1877 and continued to clear land in said forty, and in the northeast quarter of the southwest quarter, until 1880. And that the land shown upon the plat marked Government's exhibit G marked in pink situated within the southeast quarter of the northwest quarter and northeast quarter of the southwest

quarter has been continuously in cultivation and under fence from the year 1880 until the present time.

IT IS FURTHER ADMITTED that the said tract of land was cultivated by Thomas J. Killen from the year 1877 to the year 1885, inclusive, except the year 1881 when the same was cultivated by Jack Conerly. And that Stephen N. Grant has cultivated said tract from the year 1886 until the present.

CROSS EXAMINATION

By Mr. Palmer:—

Q. Mr. Killen, you say you moved upon this land in 1877? A. Yes.

Q. You say you were then about 25 years of age?
A. Somewhere about that.

Q. At that time had you ever made application to homestead any land? A. No, sir.

Q. Did you ever make application to homestead this land? A. No.

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Q. Did you make application to enter land after you left this tract in controversy? A. No, sir; never in my life.

Q. Do you know whether Jack Conerly ever made any application to homestead any land? A. No, sir; I do not know whether he did or not. I could not say as to that.

By Mr. Monk:—

Q. Was Nat married at that time, at the time he bought the land from you? A. Yes, sir.

NOTE: The "Nat" referred to is Mr. Stephen N. Grant.

Q. Did did marry— A. Married a Jackson.

Q. He did not marry your daughter? A. No; Grant was my wife's half brother.

Q. Then, when you let Mr. Grant have this property

you did not give it to him, but sold it to him? A. Yes, sir; sold it.

Q. You cannot tell you just what you got for it? A. No; I could not tell exactly. I got a steer, and a little money, and a pony. I do not know just exactly what I did get. I do not know what it was valued at, nor anything about it.

MR. STEPHEN N. GRANT, witness called in behalf of the plaintiff and intervenor, being first duly sworn, testified as follows:—

By Mr. Hunter:—

Q. Your name is Stephen N. Grant? A. Yes, sir.

Q. Where do you live? A. In Vernon Parish, Louisiana.

Q. How old are you, Mr. Grant? A. 52 years old on the 14th day of January. Born in 1863.

Q. You were born on the 14th day of January 1863? A. Yes, sir.

Q. Where were you born? A. Natchitoches Parish, Louisiana.

Q. You are a native born citizen of the United States? A. Yes, sir.

Q. Mr. Grant, did you ever live on the tract of land in controversy in this suit, and are you now living on it? A. Yes, sir.

Q. Do you know the numbers of the land involved in this suit? A. Yes, sir; the north half of the southwest quarter and the south half of the northwest quarter, Section 3, Township 3 North, Range 7 West, Louisiana Meridian.

Q. When did you first move on this tract of land? A. About the 9th day of February 1886.

Q. Was it on that date that you moved there? A. Yes, sir; to the best of my recollection. The best I can figure it out.

Q. Who was living on the land before you moved on it? A. Thomas J. Killen.

Q. How long have you known Mr. Killen? A. As far back as I can remember. Ever since I can recollect.

Q. Can you recollect when Mr. Killen moved on this tract of land? A. Yes, sir; I remember when he passed our house moving over there.

Q. Where were you living then? A. About 2 miles from there, on my father's place.

Q. Did you continue to live on your father's place until you moved on this place? A. No, sir; I first lived in Calcasieu for a while, and then I moved with my mother, and made two crops before I moved on this place.

Q. Have you been familiar with this tract of land involved in this suit since 1876? A. I have.

Q. You remember when it was that Mr. Killen moved on it? A. He moved there in the winter, in January, to the best of my recollection.

Q. In what year? A. 1877. He settled the place in 1876, that is, he worked that fall on it.

Q. Now, you say you say [saw] him move on to this place? A. Yes, sir.

Q. How long did he remain on the place? A. Until 1881, or, that is, I say 1881, I do not know, he might have left there in December 1880. According to my recollection in the matter Conerly moved there about the last of December of the first of January, somewhere right along there, and he moved there in 1881.

Q. Did Conerly buy the claim and improvements from Mr. Killen?

OBJECTION by counsel for defendants for the reason that title to real estate and realty by destination must be in writing, and parol testimony to prove same is inadmissible. This objection to stand as a general objection to all similar testimony.

RULING:

Q. Are you personally familiar with the trade between Mr. Killen and Mr. Conerly? A. No, sir; never heard them make the trade.

Q. It is simply your understanding that the trade was made? A. Yes.

Q. Mr. Conerly lived on this place in 1881? A. Yes, sir.

Q. Did he then move away from the place? A. Yes, sir.

Q. Did Mr. Killen move back? A. He did.

Q. Was there any interval of time between the time that Conerly moved off and Killen moved back? A. If there was, it was very little.

Q. Any interval of time between the time Mr. Killen moved off and Conerly moved on in 1880? A. Conerly moved some of his things on there before Killen moved off. But he moved some of his things there at least a week before Killen moved off.

Q. Was Mr. Killen the head of a family when he moved on the place? A. Yes, sir.

Q. Did he own any other property? A. No real estate. He had some personal property, personal holdings, of course.

Q. Had he ever made any homestead entry of any land that you know of? A. None that I know of; no, sir.

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Q. How old was Conerly when he moved on this place? A. I do not know how old he was, but I taken him to be a man of about 30.

Q. He was a full grown man? A. Oh, yes, sir; his beard was beginning to turn a little gray.

Q. Was Conerly the head of a family? A. At the time he moved on this place; yes, sir.

Q. Was he a citizen of the United States? A. I guess so; I am pretty sure he was.

Q. State whether or not this land was occupied continuously by Mr. Killen from the time of his settlement thereon to the time that Conerly moved on the place in 1880 or 1881? A. Yes, sir; he lived there continuously until Conerly moved on.

Q. Now, Conerly moved off in the latter part of 1881, and Killen moved back? A. Yes, sir.

Q. Were you familiar with the place during the time that Mr. Killen occupied it after 1881? A. I was.

Q. Did you live near enough to it to— A. Yes, sir; about 2 miles.

Q. Is Mr. Killen a relative of yours? A. Yes; brother-in-law.

Q. He married your sister? A. My half-sister.

Q. He married your half-sister when he settled on this land? A. Yes, sir.

Q. Did you frequently visit him there? A. Yes, sir.

Q. State how long Mr. Killen lived on the place and occupied it after he moved back when Conerly left? A. Well, he moved back when Conerly left and stayed there until about the last of January 1886. He then sold it to me, a month or so before he moved off.

Q. Was that sale in writing? A. No, sir; verbal.

OBJECTION. Counsel for defendants objects to this testimony on the ground that title to real estate must be proved by written evidence, and the same rule obtains with reference to title to improvements by destination. Hence, parol testimony is inadmissible to prove the transfer of the lands or the improvements thereon involved in this case. This objection to stand as a general objection to all of similar testimony.

Q. What was the price of the sale? A. I gave him 4 head of cattle, a mare, and \$35 in money. I do not remember if we ever appraised the stock. I do not remember.

Q. What did you purchase from Killen? A. I purchased his claim and improvements.

Q. His homestead claim and improvements? A. Well, his claim and improvements, that is all.

Q. You do not remember the value of the stock and things you gave him? A. I do not remember it; no sir.

Q. When did you move on the place? A. In February of 1886.

Q. How long have you lived on it? A. 29 years, since last February.

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Q. Have you lived on and cultivated this place continuously since February 1886? A. I have.

Q. Have you ever moved off of it? Or abandoned it? A. No; never moved off at all.

Q. At the time that you moved on this place, were you the head of a family? A. I was.

Q. You had a wife? A. A wife and one child.

Q. How many children have you now? A. Six living and 6 dead.

Q. Were all of your children, with the exception of the first, born on this place? A. No, sir; that how comes me to be so late as February in moving on the place. We lost a new-born child on the 12th day of January, Tuesday morning, 1886, and just 4 weeks from that day I moved on this place. I had to wait 4 weeks before my wife was able to move. And the other children were born on this place. Every one of them.

Q. At the time that you moved on this property, did you own any other land? A. No, sir.

Q. Do you own any other land now? A. Yes, sir; I reckon I do. I got a forty with a tax title to it.

Q. When did you get that? A. About 13 or 14 years ago. I do not remember exactly.

Q. You purchased one forty of land at a tax sale? A. Just one forty.

Q. Where is that land situated? A. In Vernon Parish.

Q. You do not live on it? A. No.

Q. Never have lived on it? A. No.

Q. Is it cultivated? A. No. You see, me and my brother bought 80 acres between us at this tax sale.

Q. I understand you to say that you have lived on and cultivated this place in controversy here continuously since

1886 when you bought from Mr. Killen? A. Yes, sir; ever since then.

Q. What was your intention relative to this land when you purchased from Mr. Killen and moved on it? A. What was my intention?

Q. Yes, sir? A. Well, I intended it for a home.

State whether or not it was your intention to acquire this land under the homestead laws? A. Yes, sir; if I could.

Q. Have you occupied it since with that intention? A. Yes.

Q. Your residence is located on the southeast quarter of the northwest quarter, is it not? A. Yes, sir.

Q. What do your improvements consist of on that land? A. A double-paned house with an L. It has 6 rooms. Just a common rough house.

Q. How many rooms? A. Six.

Q. Have you any outbuildings? A. Two double-paned barns, and a log stable, a poultry house and a smoke house.

Q. What is the value of the improvements that you have placed on this land? A. Well, I do not nearly know. A man could not have the work done for less than \$1,000.00.

Q. You think all of the improvements on the place are worth \$1,000.00? A. Yes, sir; taking in the clearing of the land and everything.

Q. Are you occupying the same house that Mr. Killen built on this tract? A. No.

Q. Is the house that you are occupying built on the same location and in the same forty that Mr. Killen's house was on? A. Yes, sir; the old house was torn down, and this one built right on the same foundation.

CROSS EXAMINATION

By Mr. Monk:—

Q. Nat, when was it that you made your first application to homestead this property? What year? A. It was in January of 1891.

Q. You had lived on this property how long up to that time? A. I had lived on it lacking a little of being 5 years.

Q. Did you know at the time that you moved on this property that the government had issued patent on it already? A. No.

Q. When did you learn that? A. I do not remember just exactly when? You know, we did not have lawyers in that section of the country those days, and Dr. Smart was my adviser. And I went to Dr. Smart, and he told me I could not homestead it because the land was railroad land. Then, 2 or 3 years after that he was talking to me, and he said, "You can homestead this land if it was settled at a certain time, at a certain date, you just sit down and write — (witness interrupted by counsel).

Q. When did you find out that the patent had issued? A. Well, I did not know just when it was issued until I heard just a short time ago. But I found out in less than a year from after I bought the place that it was claimed as railroad land.

RE DIRECT EXAMINATION

By Mr. Hunter:—

Q. Mr. Grant, part of this land is claimed by the W. R. Pickering Lumber Company and part by the Southland Lumber Company. I will ask you to state whether or not the Pickering Lumber Company is operating a saw mill in the Parish of Vernon, or was operating a saw mill in the year 1902? A.

OBJECTION: Counsel for the Pickering Lumber Company objects to this testimony on the ground that it is incompetent, irrelevant and immaterial. This objection to stand as a general objection to all testimony of this nature.

A. Yes, sir; they was operating a mill there in 1902, to the best of my recollection.

Q. Do you know how long they had been operating a mill? A. Very short time. Only a short time.

Q. Was it a large or a small mill? A. A large mill.

Q. How far was the mill from the land involved in this suit? A. From this land?

Q. Yes, sir? A. About 22 or 23 miles. Something like that.

Q. State whether or not prior to 1902 the timber on this land was estimated by any person or persons? A. Well, I could not say as to that forty that the Pickering Lumber Company claimed. The other was.

Q. The other forties belonging to the Southland Lumber Company were estimated? A. Yes, sir.

Q. When was the estimation made, do you recall? A. Well, as well as I remember, in the spring of 1902.

Q. Who made the estimation for the Southland Lumber Company? A. Three or four of them. Mr. Potter was one. That was the only one I knew.

Q. Is Mr. Potter present in the court room? A. Yes, sir.

Q. He was one of the estimators? A. Yes, sir.

Q. Did they come to your home? A. No, sir; I saw one of them, though. But I did not see Mr. Potter there. I saw one of the men on the ridge just across the line, but it was not Mr. Potter. And I did not know the others.

Q. Did you have any conversation with Mr. Potter at the time he was there with the other estimators? A. I do not think I did.

Q. Was Mr. Potter a representative of the Southland Lumber Company? A. He was the estimator at that time. That was my understanding.

Q. Do you know whether Mr. Potter estimated the timber claimed by the Southland Lumber Company in 1902, or prior to 1903? A. No, sir; I do not know. I know there was one of the men that was with him on one of the forties there. I saw him going along on the ridge. They was all divided up; they did not go together anyway.

Q. Did you have any conversation with the men you speak of at the time of that estimate? A. No.

Q. Have you had any conversation with any representative of either of the defendants in this case relative to your

homestead claim prior to the time that either of these defendants purchased the land? A. No, sir; not that I know of. There was a man by the name of Calhoun that came there—(witness interrupted by counsel for defendants)

OBJECTION: Counsel for defendants object on the grounds that the witness says he had no conversation with defendants or their representatives, and the matter with Mr. Calhoun is immaterial and irrelevant.

Q. Did you know Mr. Calhoun? A. No; never seen him until he came there.

Q. Did he come to your place? A. Yes, sir.

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Q. When was that? A. In the spring of 1901.

Q. Did he tell you who he was representing? A. No.

Q. Did you know who he was representing? A. No.

OBJECTION: Counsel for the defendants object to this testimony for the same reason set forth in the last objection, and ask that this objection be made general to apply to all testimony of this nature.

RULING:

Q. Well? A. He just tolle me this, "I am out looking over these railroad claims where people are contesting," and he says, "These lands are going to change hands, and I am out to see who was living on them." He taken my statement in regards to mine, and went on.

Q. Did you tell Mr. Calhoun about your claim? A. Yes, sir.

Q. And about how long you had been on the land? A. Yes, sir. He asked me, and taken it all down.

Q. Did he tell you who sent him, or who he was representing? A. No, sir.

Q. Mr. Grant, state whether or not it was, or was not, generally known in that community from 1877 up to the

present time that Mr. Killen and yourself claimed these four forties as a homestead?

OBJECTION: Counsel for defendants object to this testimony as calling for an opinion of the witness, and furthermore it is irrelevant, and immaterial, unless shown that such information was possessed by the defendants. That this objection be a general objection against all subsequent testimony of the kind.

RULING:

A. Why, yes, sir; it was known that we had been living there.

Q. How is that? A. It was generally known that we lived there.

Q. Was it generally understood that you and he claimed this land? A. Yes, sir.

Q. Do you know whether or not the Pickering Lumber Company and the Southland Lumber Company, or any of the other agents or representatives, knew that you were living on this land before they purchased it? A. No, sir; I do not know whether they did or not.

Q. Is Mr. Conerly living or dead? A. He has been dead for about 15 years, so I have been informed.

MR. J. R. BAGENTS, SR., witness called in behalf of plaintiff and intervenor, being first duly sworn, testified as follows:—

By Mr. Hunter:—

Q. Mr. Begents, where do you live? A. Vernon Parish, Louisiana.

Q. Do you know Mr. Stephen N. Grant? A. Yes, sir.

Q. Do you know Thomas J. Killen? A. Yes, sir.

Q. How long have you known these gentlemen? A. Known them a good long while. I have known Mr. Killen since 1867 or 1868, and Mr. Grant since he was about 10 or 11 years old.

Q. How old are you, Mr. Bagents? A. 57, last February.

Q. Did you live anywhere in Vernon Parish near Mr. Killen when he was living on the land in controversy in this case? A. Yes, sir.

Q. Are you familiar with the land involved in this suit? A. I am. I was acquainted with it before they went on it. I was with his father in 1874. I went to Mr. Grant's in 1874, and stayed there on up.

Q. You lived with Mr. Grant's father in 1874? A. Yes.

Q. How far did he live from the land involved in this suit? A. It is not very far. The land in this suit is in Section 3, and Mr. Grant's father's place was in Section 8.

Q. You have been familiar with this tract of land since 1874? A. Yes, sir.

Q. Do you remember when Mr. Killen moved on it? A. Yes.

Q. When was that? A. He began working on the place in 1876, cutting timber and building improvements. And he moved on the place somewhere in January or February 1877.

Q. Mr. Bagents, when did Thomas J. Killen move on this place? A. He went on it about 1877, along about January or February.

Q. Do you know how long he lived on the place? A. He lived on it 4 years, then, from the time he first went on to the time he sold to Mr. Conerly.

Q. Did Mr. Conerly move on the place? A. Yes, sir.

Q. How long did he reside on it? A. Somewhere about 1 year.

Q. Was there any interval of time between Killen's moving off and Conerly's moving on? A. No, sir; might have been a day or so, but they were moving about the same time.

Q. When did Conerly move off? A. In 1881. In the dry year; we all remember it by the dry year.

Q. Did Mr. Killen move back on the place. Yes, sir.

Q. Was there any interval of time between Mr. Conerly's moving off in 1881 and Mr. Killen's moving back on?

A. No.

Q. How long did Mr. Killen remain on the place after he moved back? A. About 4 years.

Q. Did he live there continuously on the place? A. He did.

Q. Now, do you know anything about the trade between Mr. Killen and Mr. Grant?

OBJECTION: Counsel for the defendants object to this testimony as it involves real estate and realty by destination and must be in writing, and cannot be established by parol. This objection to be a general as to all similar testimony.

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Q. Do you know anything about the trade between Mr. Killen and Mr. Grant? A. He gave him a pony, a mare, a yoke of steers and some money, about \$35. I do not know what the steers and mare were valued at.

Q. When did Mr. Grant move on the place? A. Immediately after Mr. Killen moved off.

Q. When was that? What year? A. Oh, I do not right remember it just now.

Q. Well, Mr. Killen testified that it was in 1886. As far as you know is that correct? A. That is correct.

Q. State whether or not Mr. Grant has resided on that place continuously since the time he moved on in 1886 to the present? A. He has.

Q. Was Mr. Grant the head of a family when he moved on this place? A. Yes, sir; he had a wife and one child when he moved on it.

Q. Do you know whether or not he owned any other land at that time? A. No.

Q. Do you know whether or not he had made any homestead entry to other land? A. No.

Q. Has he ever abandoned the place? A. No, sir.

Q. State whether or not the land involved in this suit has been continuously occupied, possessed and cultivated by Thomas J. Killen, Jack Conerly, and Stephen N. Grant from 1877 up to the present time? A. Yes, sir; it has been continuously resided upon.

Q. And cultivated? A. Yes, sir; every year.

Q. By these parties at the time that they respectively lived on it? A. Yes, sir.

Q. State whether or not it was generally understood and known throughout the community in which Grant, Killen and Conerly lived that they occupied, cultivated and claimed this land?

OBJECTION: Counsel for defendants object to this testimony for the reason that it calls for a opinion of the witness. And further that it is irrelevant and immaterial unless shown that the defendants possessed such knowledge. This objection to be made general as to all subsequent testimony of similar character.

RULING:

A. Of course, it was supposed by everybody that it was theirs. That they claimed it, at least. Them days when a man bought a place it was supposed to be his. He claimed the right to the place.

Q. The fact that these parties lived on and cultivated and claimed this place was a matter of common knowledge in that community was it not? A. Yes, sir; it was.

IT IS ADMITTED that there are present in the court room the following named witnesses, summoned on behalf of the government and intervenor:—

W. A. Jackson
F. N. Cooley
C. A. Hunt
H. B. Ford

It is further admitted that the said witnesses would, if sworn herein, testify to the same state of facts as the witness J. R. Bagents testified to on the stand.

It is further agreed that this admission shall have the same effect as proof as if said witnesses were actually sworn and actually testified herein.

DEFENDANTS' CASE.

Testimony and offerings of the W. R. Pickering Lumber Company.

MR. T. M. BARHAM, witness called on behalf of defendants, being first duly sworn, testified as follows:—
By Mr. Palmer:—

Q. Mr. Barham, where do you reside? A. Kansas City, Missouri.

Q. What connection, if any, have you with the W. R. Pickering Lumber Company, one of the defendants in this suit? A. I am secretary of the W. R. Pickering Lumber Company.

Q. Where is the head office of the Pickering Lumber Company? A. Kansas City, Missouri.

Q. How long have you held your present position? A. Ever since the company was incorporated.

Q. When? A. In 1898. 1897 or 1898, I do not remember exactly.

Q. You held that position during the year 1902? A. I did.

Q. Who has charge of the real estate of the Pickering Lumber Company? A. I have, more than anyone else.

Q. Do you remember the purchase by the Pickering Lumber Company of certain lands from Miss Staley M. Fisher? A. I do.

Q. Did you have anything to do with closing the negotiations between the company and Miss Fisher? A. I did myself.

Q. Mr. Barham, the answer alleges that the northeast quarter of the southwest quarter of Section 3, Township 3 North, Range 7 West, was purchased from Mrs. Stley M. Fisher by the W. R. Pickering Lumber Company on August 15, 1902. Prior to the purchase of this land by the Pickering Lumber Company did the company have any examinations made of the title to this land? And, if so, by whom? A. The titles were all examined by Edward L. Wells, who was at that time the company's attorney at Leesville, Louisiana. The purchase was made in 1901, and 1902. A part of the lands were transferred in 1901 and part in 1902. It took about 1 year on part of the lands before Mr. Wells completed his examination of the titles: for him to get certain necessary information from the records and so on.

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Q. Did he pass upon the titles of these particular lands with the other lands purchased from Miss Fisher? A. He did.

Q. Was his report a favorable or an unfavorable one? A. His report was to the effect that the title was good.

Q. Was that report made to the Pickering Lumber Company before they purchased this property from Miss Staley M. Fisher? A. It was.

Q. You say in that report Mr. Wells the company's attorney held that the title to the lands vested unencumbered in Miss Fisher? A. Pardon me, it was vested unencumbered in Joseph Fisher, but his estate was in court.

Q. Well, now, did the report of Mr. Wells, the attorney of the Pickering Lumber Company, influence the Pickering Lumber Company in the purchase of this land? A. To the extent that we would not have bought the lands had he reported the title unfavorably.

Q. Mr. Barham, what price per acre was paid for this land? A. Seven dollars.

Q. At that time in that vicinity was that a reasonable price for such lands? A. We really considered that it was

more than some of the lands were worth. It was a reasonable price.

Q. Did you have these lands estimated? A. We did not.

Q. Upon what basis did you make your purchase? A. The lands belonged to Joe Fisher, or his estate. There was about 7,000 acres, and the majority of these lands were mixed up with our holdings. Of course, as to that part we knew about what they contained. And we had to buy the outlying tracts, all of the lands of Mr. Fisher, you understand, or none in making the purchase. And the lands we knew about were so located that we had to buy them. And for that reason it did not make much difference as to these outlying tracts, and we had no investigation made of them.

Q. Was the southeast quarter of Section 3, Township 3 North, Range 7 West, embraced in this suit, one of the outlying tracts. A. It was.

Q. It was not mixed up with your other holdings? A. No, it was about 20 miles from our mill.

Q. You took this forty without having it especially examined? A. Yes, sir.

Q. Did you know, or did your company, that Mr. Grant had improvements on the land? A. We did not. We bought on the condition that the lands were good, that the titles were all right.

Q. You did not know anything about claims or improvements on these lands? A. No, sir.

CROSS EXAMINATION

By Mr. Hunter:—

Q. Mr. Barham, when did the Pickering Lumber Company purchase the tract of land in this suit? A. 1901 or 1902.

Q. The answer alleges that the purchase of this tract was made in 1902? That is correct as far as you know? A. Yes, sir.

94 Q. Now, in making this examination of the title what data or information did the attorney

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have before him?

A. He had access to the records as well as to the abstracts.

Q. Your attorney at that time lived in Leesville, Vernon Parish, this State? A. Yes, sir.

Q. Was his examination of the title upon the information disclosed by the mortgage and conveyance records of the parish of Vernon? A. You know, that is a hard question for me to answer. It is hard for me to say exactly upon what his opinion was based.

Q. He examined the records of the parish of Vernon? A. And he said he also went to the records; yes, sir.

Q. And that examination was made by a local attorney? An attorney who lived in this State? A. An attorney who lived at Leesville, Louisiana.

Q. Did you make any examination whatever of the tract of land itself before the company purchased? A. None whatever, as to this tract?

Q. You did not estimate the timber? A. We did not.

Q. Was any inquiry made to ascertain whether or not any person was in possession of this tract of land? A. None on our part. I do not know what he might have done.

RE DIRECT EXAMINATION

By Mr. Palmer:—

Q. Mr. Barham, Mr. Wells, who was the attorney for the Pickering Lumber Company who examined these titles and pronounced them good, is now dead? A. I think so; yes, sir.

Q. Do you know whether Mr. Wells in his examination of these titles referred to the United States Land Office records? A. I do not. The parish records contain information from the United States Land Office records; I know that. And I know that he did not rely entirely on abstracts; he examined the records.

Q. Is it not a fact that in Leesville there are in the parish records extracts from the United States Land Office for the benefit of any who might care to examine them?

A. Yes, sir.

Q. Mr. Wells had access to these as well as the records of the parish? A. Yes, sir.

RE CROSS EXAMINATION

By Mr. Hunter:—

Q. The abstract of the land office records—

OBJECTION: Counsel for the Pickering Lumber Company objects to further re-cross examination by the Government for the reason that no new matter was brought out in the re-direct examination.

RULING:

Q. The abstracts of the land office records to which you referred constituted merely of the entries, or rather the issuance of the patent to the railroad company,
95 and it not? A. Well, it referred to, as I under-

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stand it, to all the matters that appear on the Land Office Records of the United States Land Office.

Q. How do you know that fact? A. I have seen the extract records that they have in Leesville.

Q. Do the records contain, the records examined by Mr. Wells, the proceedings before the United States Land Office in the contest between Stephen N. Grant and the railroad Company? A. I could not tell you anything about that.

Q. These land office records of which there was an abstract simply related, did they not, to the entries made on the land by various persons and the issuance of the patents? A. My understanding of this matter is that the information is very definite and complete. My understanding is that every six months or so they would get additional in-

formation from the United States Land Office and put it in their records.

Q. That information from the Land Office did not contain an extract of all information relating to lands did it? A. I presume it did, and that if a contest was filed there would be a notice to that effect.

Q. Do you think the attorney had before him at that time notices of the claim and contest of Stephen N. Grant? A. I do not know; I think not.

Q. As I understand your testimony, you do not mean to say that the records examined by Mr. Wells contained information relative to the homestead claim of Stephen N. Grant? A. I do not know anything about any record containing that claim.

Q. Then you do not know whether the records examined by Mr. Wells did or did not disclose information relative to the claim of Grant to this land? A. All I know about it is that Mr. Wells was credited with being one of the best title attorneys in Louisiana, and that if Mr. Wells had discovered a cloud on the title, my opinion of him as a man is that he would have showed it in his report. And he did not show any such thing in his report.

Q. But you do not know whether or not he had any such information or not? A. I know he did not report any such in his report.

MR. W. W. POTTER, witness called on behalf of the defendant Southland Lumber Company, being first duly sworn, testified as follows:

By Mr. Monk:—

Q. Mr. Potter, are you acquainted with the lands in controversy in this case? A. I am.

Q. Were you ever called upon at any time to estimate this with other tracts of land for the Southland Lumber Company? A. I was called upon to estimate the Brown tract and also the Granger tract.

Q. When? A. In 1901. The Brown tract in January of 1901 and the Granger tract in September of 1901.

Q. Those lands involved the lands embraced in this suit? A. They did.

Q. Were you assisted in making your estimate by anyone else? A. I was.

Q. How many in number? A. Part of the time there were 3 of us and part of the time 4.

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Q. Who was in charge of these estimators? A. I was.

Q. Did you personally estimate the timber on the Grant tract? A. I did not.

Q. Do you know who did? A. I am not positive whether J. W. May or C. B. Corners did.

Q. What were your duties as estimator? A. To estimate each forty separately, and return an account of the timber thereon.

Q. Did you make a report to the company? A. I did.

Q. Did you know personally at the time that this timber was estimated that there was anybody on that land? A. I did not. I had not been on that land.

Q. Do you know of your own knowledge whether the company was aware of the fact that there was a party occupying the land? A. I do not know that they were.

Q. I believe you stated that you made the report to the company yourself? A. I did.

Q. Did your report show whether this land was occupied at the time or not? A. I do not think it did. I know that the report would show vacancies. It showed land that had been denuded, farm land, etc., but I do not think that it showed that it was occupied by anybody.

Q. Was it a part of your duty in estimating these lands to show that these lands were occupied? A. No.

Q. That was no part of your duty? A. No.

Q. And, so far as you know, you made no such report? A. No.

CROSS EXAMINATION

By Mr. Hunter:—

Q. When did you make this estimate to which you refer? A. That was made at different times. Part of this land is in what was the Granger tract and part in what was the Brown tract. We commenced with the Brown tract in January of 1901, and commenced in the Granger tract in September of 1901, and we finished the latter part of November.

Q. Were the estimates of both tracts made before the Southland Lumber Company purchased? A. They purchased the Brown tract before the Granger tract was estimated.

Q. Did they purchase the Brown tract after it was estimated by you? A. Yes, sir.

Q. The purchases of both tracts were made subsequent to the estimates? A. Yes, sir.

Q. In making the estimates of the lands involved in this suit, was it your duty as an estimator to make report of lands in cultivation? A. No; I was not requested to do so. It was our duties to report lands that were not timbered, and how much, etc. How much of the land was considered vacant, and void of timber, but no instructions were given us to report as to settlement, etc.

Q. If in making an estimate you found a tract of land in cultivation, would you treat that as un-timbered land? A. Yes.

Q. And it would be your duty as an estimator to report that fact? A. Yes, sir.

Q. Then, in making the estimates of the tracts involved in this case, if any land was found to be in cultivation, it would have been reported as untimbered land? A. Yes, sir.

Q. Do you know what the report was in reference to this particular tract? A. I do not.

Q. If the estimator found on this tract of land claimed by the Southland Lumber Company that a part was in cultivation, it was his duty to have you report as to the fact that a certain part of the tract was not timbered? A. Well, they was not given instructions that way.

Q. It was customary for estimators to make reports embodying information as to lands that did not have any timber on it? A. It was customary for them to diagram how much of that piece of land carried any timber. If we found land that was vacant on any particular forty, we would make a diagram to that effect.

Q. What data and information is conveyed by your report and diagram as to cultivation and settlement? A. I do not think any information is conveyed as to cultivation and settlement.

Q. As I understand it, if lands were found to be in cultivation and settled upon, and the timber on such lands had been denuded, your diagram and report would show that such lands were denuded of timber? A. Yes, sir.

Q. And if the general custom had been followed in this case, the report and the diagram submitted to the Southland Lumber Company would have shown that part of this particular land was not timbered? A. Yes, sir; if the custom had been followed. I am not sure that it was.

Q. Would you or not consider it a part of the duty to show on his report or the diagram lands that did not have timber on it? A. I always do it.

Q. Have you reason to doubt that the general custom was not followed in this case? A. No; I have no reason to doubt it.

Q. Did you personally go upon the land claimed by Mr. Grant in this suit? A. No, sir.

Q. You were in charge of the estimators, as I understand it? A. Yes. We were in camp about a mile away. We divided the land, each party taking a certain section. Then the men would make their reports to me, and I would consolidate their reports and forward them to Davenport, Iowa.

Q. Well, at the time that this estimate was made, were

you aware of Mr. Grant's claim, or that he had a part of this land in cultivation? A. No.

Q. Were you aware of the fact that he resided on part of the land? A. No, sir.

Q. One of the estimators did go on the tract now claimed by Mr. Grant? A. Yes, sir. I have answered that question. That was a part of his duty.

Q. This estimator who went on the tract of land claimed by the Southland Lumber Company in this suit went on the land and made his estimate and report prior to the purchase of the land by the Southland Lumber Company? A. Sure.

RE DIRECT EXAMINATION.

By Mr. Hudson:—

Q. Do you know, Mr. Potter, whether that estimator in his report mentioned Grant's having been upon that land? A. I do not remember. I hardly think he did. No name was usually mentioned. I do not know whether that estimator ever had a conversation with Mr. Grant.

Q. Then, your statement that he went on the land before the purchase by the Southland Lumber Company was made as based upon the fact that he went on the forty or the section where Mr. Grant claims to have been? In other words, you have no exact knowledge or recollection of Mr. Grant's having been there? A. No.

Q. Do you know whether or not any of your party have any such knowledge? A. No; I do not know.

Q. Do you know whether they had any knowledge, or knew, of Grant being on that land? A. No. Grant, he visited us at our camp, but I did not know where he lived.

By Mr. Monk:—

Q. Where did these parties who helped you live? A. Chippewa Falls, Wisconsin.

Q. They were strangers? A. Yes, sir; just as I was.

RE CROSS EXAMINATION.

By Mr. Hunter:—

Q. Who was the estimator who went on the tract of land claimed by the Southland Lumber Company? A. I could not tell.

Q. Well, Mr. Potter, in making the report was it not the duty of the estimator to show in his report that a part of the land he estimated was a field? A. Yes.

Q. In making a diagram of the land estimated, if the estimator found a field on the tract, it was his duty to so report, was it not? A. Yes; they always did. They likewise made that diagram.

Q. And this diagram should show a field, if a field was in fact on the land? A. It should, if the estimator had done his duty. That might have been omitted, showing only that there were so many thousand feet of timber on the forty.

Q. If the estimator did his duty, and the field was on the land, his report would show that fact? A. Yes, sir.

Q. Have you any reason to believe that the general custom was not followed in this case? A. No; if it was not, it was carelessness.

Q. Because it was the custom to show in any report and diagram to show any field, and it was the duty of the estimator to make report of such facts? A. Yes, sir.

RE DIRECT EXAMINATION

By Mr. Hudson:—

Q. Was it the custom and duty to show that they were occupied and cultivated, or only open or denuded? A. Only to show open and denuded places.

Q. Was there a difference in the manner the fact was reported or indicated on the diagram of which you

Page 26.

99 spoke when the vacant place was a windfall, was simply denuded, was a pasture. Or were they all reported the same? A. Yes; you could look at the dia-

gram and see where the timber sat on the forty, and what part of the forty was vacant.

Q. The object of the diagram was to show the position of the timber upon the lands? A. Yes, sir.

Q. Was it their custom in their reports to make any mention of fields being cultivated, or houses being built on them? A. No.

RE CROSS EXAMINATION

By Mr. Hunter:—

Q. Well, if the estimator found a field on the tract of land, it was his duty to show that he did find such a field? A. Well, he only said "open land." The object was to convey the idea whether it was timbered or not. It was not necessary to go into detail about it: to inquire whether anybody lived there or not.

Q. Assuming that it was not his duty to see if anybody was on the land, was it not his duty and custom to report the existence of such field? A. It was the custom to do so; yes, sir. I do not know whether it was his duty. The parties who bought wanted to know how much timber was on the land. They were not buying the land; only the timber.

RE DIRECT EXAMINATION

By Mr. Hudson:—

Q. Did you understand the latter part of counsel's question to report the fields as fields or open land? A. Simply denuded of timber.

Q. In other words, the idea that we are trying to get at is whether it was the duty of these estimators when they found a cultivated field to report it as a cultivated field, or a piece of land on which there was no timber? A. Just as a piece of land on which there was no timber.

RE CROSS EXAMINATION

By Mr. Hunter:—

Q. Well, I understood you to say that when the estimator found a field on a tract of land which he was esti-

mating it was his duty or custom to report the existence of such field? A. If it was an old field, he might say "old field." Then, when it was a wind-fall he would put "wind-fall." And he would put where there was any timber. It was not the duty or custom to say that it was under cultivation or under fence or anything of that kind, because the parties wanted to know how much timber was on that land.

Q. Well, irrespective of whether the field was in cultivation or whether the land was occupied, if the estimator found a field was it or not the custom of the estimator to report the existence of the field. Whether they said anything about the field being in cultivation or not? A. It was the custom; yes, sir.

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Page 27.

ADMISSION: It is admitted that the intervention of Stephen N Grant filed in this case was prepared by the attorneys for the plaintiff and filed herein on their suggestion.

Baton Rouge, Louisiana,
August 21, 1915 /

I hereby certify that the above and foregoing testimony is a correct transcription of my stenographic notes taken at the hearing of the above cause.

LOUIS LACROIX
Clerk to United States Attorney.

ENDORSED: No. 947. United States District Court, Western District of Louisiana. United States vs New Orleans Pacific Ry. Company, and Pickering Lumber Company and Southland Lumber Company. **TESTIMONY.** Filed Nov. 6, 1915, Leroy B. Gulotta, Clerk, U. S. District Court, West Dist. of Louisiana.

101 RESOLUTION OF STOCKHOLDERS'
MEETING.

Govt's Ex. "A"

Whereas the board of directors of this company have duly adopted the following resolution to wit:

RESOLUTION.

"WHEREAS the Congress of the United States has duly adopted an act, approved February 8, 1887, entitled "An act to declare a forfeiture of lands to the New Orleans, Baton Rouge and Vicksburg Railroad Co., to confirm title to certain lands, and for other purposes," and it is provided in the third section thereof as follows: 'That the relinquishment of the lands and the confirmation of the grant provided for in the second section of this act are made and shall take effect whenever the Secretary of the Interior is notified that said New Orleans Pacific Railroad Co., through the action of a majority of its stockholders, has accepted the provisions of this act, and is satisfied that this company has accepted and agreed to discharge all the duties and obligations imposed upon the New Orleans, Baton Rouge & Vicksburg Railroad Co. by the Act of March 3, 1871, entitled "An act to incorporate the Texas Pacific Railroad Co., and to aid in the construction of its road, and for other purposes": Now therefore be it

"RESOLVED BY THE BOARD OF DIRECTORS OF THE NEW ORLEANS PACIFIC RAILWAY CO., That the provisions of the said Act of Congress are hereby accepted, and that the Company do also accept and will discharge all the duties and obligations imposed upon the New Orleans, Baton Rouge and Vicksburg Railroad Co. by the act of March 3, 1871, entitled "An act to incorporate the Texas Pacific Railroad Co., and to aid in the construction of its road, and for other purposes."

"RESOLVED, That a meeting of stockholders of the company be called for Thursday, the 14th of April, 1887, at 12 m., for the purpose of accepting the provisions of said

act of Congress of February 8, 1887, and accepting and agreeing to discharge the said duties and obligations imposed upon the said New Orleans, Baton Rouge & Vicksburg Railroad Co. by said act of Congress of 1871;" THEREFOR be it

RESOLVED by this meeting, representing 67,000 shares of stock out of the 67,200 shares issued and outstanding, That the above resolution, and the same hereby is, in all things ratified and confirmed; that this company does hereby accept the provisions of said act of Congress of February 8, 1887; and also accepts and will discharge all the duties and obligations imposed upon the New Orleans, Baton Rouge & Vicksburg Railroad Co. by said act of Congress of March 3, 1871.

RESOLVED, That the said Board of Directors are hereby authorized and directed to adopt any and all resolutions and the president and secretary of this company to execute any and all instruments, under corporate seal or otherwise, necessary to complete, consummate, or evidence such acceptance of said Act of February 8, 1887, and to execute any instruments required or needful whereby this company agrees to discharge all duties and obligations imposed upon the New Orleans, Baton Rouge & Vicksburg Railroad Co. by said act of March 3, 1871, entitled "An act to incorporate the Texas Pacific Railroad Co., and to aid in the construction of its road, and for other purposes."

A true copy of the minutes.

Attest: April 14, 1887.

ROBERT STRONG, Secretary.

102 AGREEMENT TO RECONVEY LANDS.

Govts "B"

It is hereby agreed and stipulated by the New Orleans Pacific Railway Co., and by John F. Dillon and Henry M. Alexander, trustees of the land grant claimed by said railway company, as follows:

1. That all appeals now pending before the Secretary of the Interior from decisions of the Commissioner of the General Land Office adjudging that the adverse claimants were actual settlers at the date of definite location of said railway company's road shall be, and they are hereby, withdrawn, to the end that said settlers may obtain patents for said lands.
2. That neither said railway company nor said trustees will hereafter take appeals to the Secretary of the Interior from decisions of the Commissioner of the General Land Office adjudging that the adverse claimants were actual settlers at the date of definite location of said railway company's road, but, to the end that said settlers may obtain patents for said lands, said adjudication by the Commissioner shall be regarded as final.
3. That in cases where patents have issued to said railway company for lands which have been or may hereafter be adjudged by the Commissioner of the General Land Office to have been in the possession of actual settlers at date of the definite location of said railway company's road, and title is in said railway company, said railway company and said trustees agree to make without delay, conveyance thereof to the United States; and where such lands have been sold by said railway company to third persons, said railway company undertakes to recover title thereto without delay and convey the same to said settlers or to the United States, and the said trustees undertake to join in such conveyances and to do all acts necessary on their part to enable the railway company to carry out this agreement and stipulation.

Dated August 3, 1892.

JOHN F. DILLON,
H. M. ALEXANDER,
As Trustees.

THE NEW ORLEANS PACIFIC RAILWAY COMPANY
By D. A. McKNIGHT, Attorney.

103 396576

"F", RJFM 4-207

R. J. F. M.

F R D

DEPARTMENT OF THE INTERIOR

General Land Office,

Washington, D. C. March 27, 1915.

Govt's Ex. "C"

I hereby certify that the annexed copies of letters and papers relating to the contest case of STEPHEN N. GRANT vs NEW ORLEANS PACIFIC RAILWAY COMPANY, are true and literal exemplifications from the records and files of this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the City of Washington on the day and year above written.

(Seal)

C. M. BRUCE

Assistant Commissioner of the
General Land Office.

Filed Nov. 6, 1915. Leroy B. Gulotta, Clerk, U. S.
District Court, West Dist. of Louisiana.

6-3451.

104

396576-1

(4-007)

HOMESTEAD

Application

No.....

Land Office at.....

....., 188 ..

I, STEPHEN N. GRANT, of Walnut Hill, La., do hereby apply to enter, under Section 2289, Revised Statutes of the United States, and as provided in Sec. 2 of Act of Con-

11 FORTY-SIX U S Dist Attorneyq U
 gress approved 8th Feby. 1889, the South Half of North-
 west Quarter & N½ of SW¼ of Section (3), in Township
 3 North of Range (7) West, containing acres.

STEPHEN N. GRANT.

Land Office at.....
 , 188 .

I,, REGISTER OF THE LAND OFFICE, do
 hereby certify that the above application is for Surveyed
 Lands of the class which the applicant is legally entitled to
 enter under Section 2289, Revised Statutes of the United
 States, and that there is no prior valid adverse right to
 the same.

(11568-o M) o 6-261

Register.

105 396576-2
 4-089.

HOMESTEAD AFFIDAVIT.

Under Section 2294, Revised Statutes, for settlers who can-
 not appear at the District Land Office.

Office of the Clerk of the Court
 for Vernon County, Louisiana,

Dec. 20th, 1890.

I, Stephen N. Grant, of Walnut Hill, La., having filed
 my Homestead Application No., do solemnly swear
 that I am the head of a family and over the age of 21 years,
 and a native born citizen of the United States of America;
 that said application No. is made for the purpose of

actual settlement and cultivation; that said entry is made for my exclusive use and benefit, and not directly or indirectly for the use or benefit of any other person or persons whomsoever; that I and my family are now residing on the land I desire to enter, and that I have made a bona fide improvement and settlement thereon; that said settlement was commenced in the year 1876; that my improvements consist of a dwelling house, corn crib, smoke house, etc., and 15 acres of land in cultivation and that the value of the same is \$100.00; that owing to the great distance and expense of a trip I am unable to appear at the District Land Office to make this affidavit, and that I have never before made a homestead entry except (set in cancelled letters)

STEPHEN N. GRANT

Sworn to and subscribed before me this 20th day of December, 1890.

(Seal)

Z. T. CRAFT,
Clerk of the Court for Vernon Ph. Louisiana.

NOTE.—The claimant must fill up the blank places above, showing whether he is the head of a family or over twenty-one years of age; whether a native citizen or has declared his intention to become a citizen; whether he and his family, or some member thereof, is residing on the land, giving the date of actual settlement, describing the dwelling house and improvements, and stating the value of the same; and stating reason for not appearing at the District Land Office. If claimant ever before made a homestead entry, describe the same; if not, draw a line over the word "except."

106

396576-3

STATE OF LOUISIANA, }
PARISH OF VERNON. }

Personally appeared before me the undersigned authority STEPHEN N. GRANT, a resident of the Parish of

Vernon, State aforesaid, who being by me duly sworn, declared and said that the land described in his Homestead Application of this date, was settled by Mr. Thomas J. Killen in the year 1876; that said Killen cultivated and resided on the land until the year 1880 and then sold the same to Mr. Jack Conerly, he residing on and cultivating said land for the space of one year, then the said Killen removed back and remained on the same continuously up to the year 1885; that then he moved on the land and have continuously resided on the same and cultivated the same to the present date.

STEPHEN N. GRANT.

Sworn to and subscribed before me
on this 20th Dec. 1890.

Z. T. CRAFT

(Seal) Clk. Dist. Court.

Also appeared at the same time and place G. W. Youngblood and F. M. COOLEY, who being duly sworn, corroborated the statements made by Stephen N. Grant, by saying that Mr. Killen settled the place as first stated by said Grant and the land has been continuously resided upon as first stated.

G. W. YOUNGBLOOD
F. M. COOLEY

Sworn to and subscribed before me on this 20th day of December, 1890.

Z. T. CRAFT

(Seal) Clerk Dist. Court, Vernon Ph. La.

107

396576-5

IN THE U. S. LAND OFFICE

Natchitoches, La.

In the Matter of Claim of } On notice of
STEPHEN N. GRANT. } Feby. 17/91.

OBJECTIONS BY THE NEW ORLEANS PACIFIC
RAILWAY COMPANY.

To

THE REGISTER and the RECEIVER

U. S. Land Office,
Natchitoches, La.

Please take notice that the New Orleans Pacific Railway Company hereby objects to the claim in favor of the claimant above named and on the following grounds:

1st. The claimant is not, and never has been, an actual settler on the land claimed, within the meaning of the Acts of Congress respecting the public lands: nor has claimant any right, either as matter of fact or law, under the second section of the Act of Congress of the United States of Feb. 8th, 1887, entitled "An act to declare a forfeiture of lands granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company, to confirm title to certain lands, and for other purposes."

2nd. That the claimant has never complied with the Acts of Congress, U. S. Rev. Stat., 2257-2317, in such manner as to lay a legal foundation for his claim as against objector.

3rd. That the claimant, at the time of definite location of the New Orleans Pacific Railway, as fixed by the second section of the Act of Congress of February 8th, 1887, entitled "An Act to declare a forfeiture of lands granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company, to confirm title to certain lands, and for other purposes" had not done any of the acts or made any of the

declaratory statements, proofs, payments or tenders of payment, required by law to lay a foundation for his claim as against objector.

Yours respectfully,

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396576-5 Continued.

New Orleans, La.

Feby. 21, 1891.

Filed

February 25th, 1891.

L. Duplex, Register.

N. O. Pacific Ry. Co.
E. B. Wheelock, Pres't.
Howe & Prentis, Attys.

396576-6

REGISTRY RETURN RECEIPT sent Feb. 20, 1891.

Reg. No. 213 from Post Office at NATCHITOCHES, LA.

Reg. Letter ADDRESSED TO COL. E. B. WHEELOCK,

Reg. Package NEW ORLEANS, LA.

(Word "Package" set in cancelled letters!)

After obtaining receipt below the Postmaster will mail this card, without cover and without postage, to address on the other side.

RECEIVED THE ABOVE DESCRIBED REGISTERED

*LETTER

PARCEL

(Sender's name on other side)

Sign on dotted lines to }
the right. } E. B. WHEELOCK

When delivery is made to other
than addressee the name of
both addressee and recipient
must appear. 24015

*—Erase Letter or Parcel according to which is sent.

109

396576-8.

4-366.

RAILROAD CONTEST.—NOTICE OF HEARING.

UNITED STATES LAND OFFICE,

Natchitoches, La.

February 26th, 1891.

STEPHEN N. GRANT, of Vernon Parish, La., having applied for the S $\frac{1}{2}$ NW $\frac{1}{4}$; N $\frac{1}{2}$ SW $\frac{1}{4}$ of Sec. No. 3, T. 3 of R. 7, under the Homestead laws; and the President of the N. O. Pacific Railway Company having filed objections to the allowance of said application, claiming that said land was selected for the benefit of said company on the day of A. D. 18.., an investigation is hereby ordered to determine whether said land is subject to the right of the said company, and a hearing therein will be had before the Register and Receiver at this office on the 6th day of April, A. D. 1891, at 10 o'clock A. M., at which time and place the parties interest are hereby summoned to be present and produce testimony.

L. DUPLEX, Register.

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396576-9

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111

396576-

(4-369)

HOMESTEAD PROOF—TESTIMONY OF WITNESS.

FRANCIS M. COOLEY being called as witness in support of the Homestead application for entry of Stephen N. Grant for S $\frac{1}{2}$ NW $\frac{1}{4}$; N $\frac{1}{2}$ SW $\frac{1}{4}$, Sec. 3, Tp. 3 N. R. 7 W, testifies as follows:

Ques. 1.—What is your name, age, and post office address?

Ans. Francis M. Cooley, 36 years—Walnut Hill P. O.

Ques. 2—Are you well acquainted with the claimant in this case and the land embraced in his claim?

Ans. Stephen N. Grant. Yes.

Ques. 3—Is said tract within the limits of an incorporated town or selected site of a city or town, or used in any way for trade or business?

Ans. No.

Ques. 4—State specifically the character of this land—whether it is timber, prairie, grazing, farming, coal or mineral land.

Ans. Hill Land, only desirable for farming.

Ques. 5—When did claimant settle upon the homestead and at what date did he establish actual residence thereon?

Ans. In 1885 and established residence thereon at the same time.

Ques. 6—Have claimant and family resided continuously on the homestead since first establishing residence thereon? (If settler is unmarried, state the fact.)

Ans. Yes, they have.

Ques. 7—For what period or periods has the settler been absent from the land since making settlement, and for what purpose; and if temporarily absent, did claimant's family reside upon and cultivate the land during such absence?

Ans. Never

Ques. 8—How much of the homestead has the settler cultivated and for how many seasons did he raise crops thereon?

Ans. About 15 acres—made 5 crops on same.

Ques. 9—What improvements are on the land and what is their value?

Ans. Double pen log house—crib—stable & smoke house worth about \$100.00.

Ques. 10—Are there any indications of coal, salines, or minerals of any kind on the homestead? (If so, describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans. No.

112 Ques. 11—Has the claimant mortgaged, sold, or contracted to sell, any portion of said homestead?

Ans. No

Ques. 12—Are you interested in this claim; and do you think the settler has acted in entire good faith in perfecting this entry?

Ans. No. Believe that settler has acted in good faith.

F. M. COOLEY.

I HEREBY CERTIFY that the foregoing testimony was read to the witness before being subscribed and was sworn to before me this 6th day of April, 1891.

L. DUPLEIX,
Register.

(SEE NOTE ON FOURTH PAGE)

(The testimony of witnesses must be taken at the same time and place and before the same officer as claimant's final affidavit. The answers must be full and complete to each and every question asked, and officers taking testimony will be expected to make no mistakes in dates, description of land, or otherwise.)

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396576-

(4-369)

HOMESTEAD PROOF—TESTIMONY OF WITNESS.

JAPTHA BEESON being called as witness in support of the Homestead application for entry of Stephen N. Grant for S $\frac{1}{2}$ NW $\frac{1}{4}$; N $\frac{1}{2}$ SW $\frac{1}{4}$, Sec. 3, Tp. 3 N. R. 7 W, testifies as follows:

Ques. 1—What is your name, age, and post office address?

Ans. Japtha Beeson—62 years Walnut Hill.

Ques. 2—Are you well acquainted with the claimant in this case and the land embraced in his claim?

Ans. I am.

Ques. 3—Is said tract within the limits of an incorporated town or selected site of a city or town, or used in any way for trade or business?

Ans. No.

Ques. 4—State specifically the character of this land—whether it is timber, prairie, grazing, farming, coal or mineral land.

Ans. Hill Land.

Ques. 5—When did claimant settle upon the homestead and at what date did he establish actual residence thereon?

Ans. In 1885 at which time he established actual residence thereon.

Ques. 6—Have claimant and family resided continuously on the homestead since first establishing residence thereon? (If settler is unmarried, state the fact.)

Ans. They have.

Ques. 7—For what period or periods has the settler been absent from the land since making settlement, and for what purpose; and if temporarily absent, did claimant's family reside upon and cultivate the land during such absence?

Ans. Never was absent

Ques. 8—How much of the homestead has the settler

cultivated and for how many seasons did he raise crops thereon?

Ans. About 15 acres—made 5 crops on same.

Ques. 9—What improvements are on the land and what is their value?

Ans. A double pen log house and other improvements worth about \$100.00

Ques. 10—Are there any indications of coal, salines, or minerals of any kind on the homestead? (If so, describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans. No.

114 Ques. 11—Has the claimant mortgaged, sold, or contracted to sell, any portion of said homestead?

Ans. No to my knowledge.

Ques. 12—Are you interested in this claim; and do you think the settler has acted in entire good faith in perfecting this entry?

Ans. I am not. Believe that applicant has acted in good faith.

JAPTHA BEESON

I HEREBY CERTIFY that the foregoing testimony was read to the witness before being subscribed and was sworn to before me this 6th day of April, 1891.

L. DUPLEIX,
Register.

(SEE NOTE ON FOURTH PAGE)

(The testimony of witnesses must be taken at the same time and place and before the same officer as claimant's final affidavit. The answers must be full and complete to each and every question asked, and officers taking testimony will be expected to make no mistakes in dates, description of land, or otherwise.)

115

396576-12.

4-369.

HOMESTEAD PROOF—TESTIMONY OF CLAIMANT.

STEPHEN N. GRANT, being called as a witness in his own behalf, in support of his application of homestead entry No. for S $\frac{1}{2}$ NW $\frac{1}{4}$, & N $\frac{1}{2}$ SW $\frac{1}{4}$, Sec. 3, Tp. 3 N. R. 7 W. testifies as follows:

Ques. 1—What is your name, age and post office address?

Ans. Stephen N. Grant—28 years—Walnut Hill, La.

Ques. 2—Are you a native born citizen of the United States, and if so, in what State or Territory were you born?*

Ans. I am. State of Louisiana.

Ques. 3—Are you the identical person who made application to homestead entry No., at the Natchitoches land office on the 20th day of December, 1890, and what is the true description of the land now claimed by you?

Ans. S $\frac{1}{2}$ of NW $\frac{1}{4}$ and N $\frac{1}{2}$ SW $\frac{1}{4}$, Sect. 3, T. 3 N. R. 7 W.

Ques. 4—When was your house built on the land and when did you establish actual residence therein? (Describe said house and other improvements which you have placed on the land, giving total value thereof.)

Ans. In 1876 by T. J. Killen—and established thereon an actual residence in 1885 after purchasing the former settler's rights to the land. Log house 14x16, crib, smoke house—worth about \$100.00.

Ques. 5—Of whom does your family consist; and have you and your family resided continuously on the land since first establishing residence thereon? (If unmarried, state the fact.)

Ans. Wife and three children—all the family has resided on this land since having purchased the same.

Ques. 6—For what period or periods have you been absent from the homestead since making settlement, and for

what purpose; and if temporarily absent, did your family reside upon and cultivate the land during such absence?

Ans. I never was absent.

Ques. 7—How much of the land have you cultivated each season and for how many seasons have you raised crops thereon?

Ans. About 15 acres—cultivated for 5 successive seasons.

Ques. 8—Is your present claim within the limits of an incorporated town or selected site of a city or town, or used in any way for trade and business?

Ans. No.

Ques. 9—What is the character of the land? Is it timber, mountainous, prairie, grazing, or ordinary agricultural land? State its kind and quality, and for what purpose it is most valuable.

Ans. Hill.

116 Ques. 10—Are there any indications of coal, salines, or minerals of any kind on the land? (If so, describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans. No.

Ques. 11—Have you ever made any other homestead entry? (If so, describe the same.)

Ans. No.

Ques. 12—Have you sold, conveyed or mortgaged any portion of the land; and if so, to whom and for what purpose?

Ques. 13—Have you any personal property of any kind elsewhere than on this claim? (If so, describe the same, and state where the same is kept.)

Ans. No.

STEPHEN N. GRANT.

I HEREBY CERTIFY that the foregoing testimony was read to the claimant before being subscribed, and was sworn to before me this 6th day of April, 1891.

L. DUPLEIX

Reg.

(SEE NOTE ON FOURTH PAGE.)

"* (In case the party is of foreign birth a certified transcript from the court records of his declaration of intention to become a citizen, or of his naturalization, or a copy thereof, certified by the officer taking the proof, must be filed with the case. Evidence of naturalization is only required in final (five year) homestead cases.)

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396576-14

U. S. LAND OFFICE,
Natchitoches, La.

Personally came and appeared before me the undersigned authority Stephen N. Grant, a resident of Vernon Parish, who, under oath, says that in 1885 he purchased from T. J. Killen, of same Parish, the right of improvements and former settler of the S $\frac{1}{2}$ of NW $\frac{1}{4}$ and N $\frac{1}{2}$ SW $\frac{1}{4}$, Sect. 3, Tp. 3 N. R. 7 W. That, to his knowledge, said T. J. Killen settled on said land in 1876 and made crop on the same every season since he settled upon the same. That he paid to said T. J. Killen the sum of \$100.00 for his rights and improvements.

STEPHEN N. GRANT.

Sworn to and subscribed on this 6th April 1891.

L. DUPLEX
Register.

Also appeared Japtha Beeson and Francis M. Cooley, both residents of Vernon Parish, La., who says that they are well acquainted with applicant and also T. J. Killen. That to their own knowledge, said T. J. Killen was a bona fide settler upon the N $\frac{1}{2}$ SW $\frac{1}{4}$ & S $\frac{1}{2}$ NW $\frac{1}{4}$, Sec. 3, Tp. 3 R. 7 W since long before 1879. That he was cultivating the land up to the time he sold his rights and improvements to the present claimant.

F. M. COOLEY
JEPHTHA BEESON

Sworn to and subscribed before me, this 6th day of April 1891.

L. DUPLEX,
Register.

113

296576-15

**PROCEEDINGS
IN THE UNITED STATES LAND OFFICE
AT NATCHITOCHES, LA.**

In the matter of the application of Stephen N. Grant to enter, as provided in Section 2 of the Act of Congress approved Feb'y. 8th, 1887, the S½ of NW¼ and the N½ of SW¼ of Sec. 3, in Tp. 3 N. of R. 7 W. La. Mer.

On the objections of the N. O. Pacific Ry. Co.

On April 6th, 1891, the day fixed for the trial of this case, the claimant, Stephen N. Grant, and his two witnesses, Francis M. Cooley and Jeptha Beeson, appeared at the U. S. Land Office, at Nachitoches, La., in support of the claim.

The case was called at 10 o'clock A. M. The N. O. Pacific Ry. Co. did not appear. The objections of the N. O. Pacific Ry. Co., received by registered mail, were duly filed.

The claimant, Stephen N. Grant, appeared and filed the following:

EVIDENCE OF CLAIMANT.

1. Preliminary corroborated affidavit.
2. Copy of notice of application and proof of service, by registered mail.
3. Copy of notice of hearing and service thereof, by registered mail.
4. Testimony of claimant, Stephen N. Grant, taken at hearing, April 6th, 1891.
5. Testimony of witness, Francis M. Cooley, taken at hearing April 6th, 1891.
6. Testimony of witness, Jeptha Beeson, taken at hearing April 6, 1891.

EVIDENCE CLOSED.

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396576-16

REPORT.

The S $\frac{1}{2}$ of NW $\frac{1}{4}$ and the N $\frac{1}{2}$ of the SW $\frac{1}{4}$ of Section 3, in Tp. 3 N. of R. 7 W. La. Mer., is situated within the granted limits of the New Orleans Pacific Railway Company, and was selected by said Railway Co.

It is shown by the testimony, that the claimant, Stephen N. Grant, is a settler, in good faith, on said tract of land above described, since 1885; that he purchased from T. J. Killen, for a valuable consideration, all his rights and interests thereto, with the improvements thereon. That said T. J. Killen's claim of title is traced back, through several previous settlers, to the year 1876; that the said tract has been occupied, cultivated and resided upon by the successive settlers, thereon, without interruption from the said year, 1876, to the present time. Hence, it follows, that the occupation & cultivation of said tract of land, and residence upon same, by the successive settlers, have been continuous and are prior to the date of definite location by the N. O. Pacific Ry. Co., viz: Nov. 17, 1882.

We, therefore, recommend that the objections of the New Orleans Pacific Ry. Co. be dismissed, and that the claimant, Stephen N. Grant, having complied with all the requirements of law to establish his homestead claim, be allowed to enter, under the homestead laws, the S $\frac{1}{2}$ of the NW $\frac{1}{4}$ and the N $\frac{1}{2}$ of the SW $\frac{1}{4}$ of Section 3, in Tp. 3 N. of R. 7 W. La. Mer.

Thus done and signed at the United States Land Office, at Natchitoches, La., on the 6th day of April, A. D. 1891.

Respectfully,

L. DUPLEX, Register.

A. C. LEMEE, Receiver.

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396576-18

REGISTRY RETURN RECEIPT sent May 13, 1891.

Reg. No. 161 from Post Office at Natchitoches, La.

Reg. Letter } Addressed to Col. E. B. Wheelock,
Reg. Parcel } New Orleans, La.

After obtaining receipt below the Postmaster will mail this card, without cover and without postage, to address on the other side.

RECEIVED THE ABOVE DESCRIBED } PARCEL
REGISTERED } *LETTER

(Sender's name on other side) E. B. WHEELOCK

Sign on dotted lines to } W. R. E.
the right.

When delivery is made to other
than addressee, the name of
both addressee and recipient
must appear.

*Erase letter or parcel according to which is sent.

396576-19

When the registered letter or parcel accompanying this card is delivered, the postmaster will require signature to the receipt on the other side, also on his record of registered deliveries, and mail this card without cover to address below.

A penalty of \$300 is fixed by law for using this card for other than official business.

POST OFFICE DEPARTMENT
Official Business.

POST OFFICE AT	NEW ORLEANS LA.
	MAY 15
	5 P.M.

RETURN TO:

Name of Sender **REG. & REC.**
 Street and Number }
 or Post Office Box }
 Post Office at **NATCHITOCHES**
 County of STATE OF **LA.**

121 **396576-20**

IN THE U. S. LAND OFFICE
Natchitoches, La.

In the Matter of Claim of } **May 13/91.**
 STEPHEN N. GRANT. } On notice of

**APPEAL BY THE NEW ORLEANS PACIFIC
 RAILWAY COMPANY.**

To

THE REGISTER and the RECEIVER,
U. S. LAND OFFICE,

Natchitoches, La.

Please take notice that the New Orleans Pacific Railway Company hereby appeals to the Commissioner of the General Land Office from the decision rendered by your office on the 6th day of April, 1891, in favor of the claimant above named and on the following grounds:

- 1st. That the decision hereby appealed from is contrary to the law and the evidence in the case.
- 2nd. That the claimant has never complied with the acts of Congress U. S. Rev. Stats. 2257-2317, in such manner as to lay a legal foundation for his claim as against appellant.

3rd. That the claimant, at the time of definite location of the New Orleans Pacific Railway Company, as fixed by the second section of the Act of Congress of February 8th, 1887, entitled "An act to declare a forfeiture of lands granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company, to confirm title to certain lands and for other purposes," had not made any of the declaratory statements, proofs, payments or tenders of payment, required by law to lay a foundation for his claim as against appellant.

Yours respectfully,

New Orleans, La.

May 26, 1891.

Filed

L. DUPLEX,

Reg.

N. O. Pac. Ry. Co.

E. B. Wheelock, Prest.

Howe & Prentis, Attys.

122

396576-21.

Walnut Hill, Vernon Parish, La.

May the 29th, 1891.

Hon. L. Duplex,

Sir:

In answer to your letter which I received today I deny the rights of the railroad Co. to the land I have made application for and I still contend for the same under the laws of the United States.

Respectfully yours,

STEPHEN N. GRANT.

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396576-22

UNITED STATES LAND OFFICE

Natchitoches, La.

June 3rd. 1891.

Hon. Commissioner,

General Land Office,

Washington, D. C.

Sir:

We have the honor to transmit herewith application of Stephen N. Grant to enter under the Homestead Law, as

provided by Section 2 of Act of Congress, approved Feb'y. 8th, 1887, entitled "An Act to declare a forfeiture of lands granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company to confirm title to certain lands and for other purposes," the S $\frac{1}{2}$ of NW $\frac{1}{4}$ and N $\frac{1}{2}$ of SW $\frac{1}{4}$, Section 3, Tp. 3 N. R. 7 W. together with corroborative affidavit, notices, objections, testimony, &c., accompanying the same.

Our joint opinion duly signed is attached to said case. Our decision being in favor of the applicant and recommending that he be entitled to enter the lands as applied for. Due notice of our decision and of right of appeal was given to E. B. Wheelock, President of the New Orleans Pacific Railway Company by Register and Receiver on May 13th, 1891. Same duly acknowledged as per letter return receipt and appeal dated May 26th, 1891. Ans. of Claimant to appeal May 27—91.

Very respectfully,

L. DUPLEX, Register.
A. E. LEMEE, Receiver.

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396576-24

GENERAL LAND OFFICE

J
U
N 70796

8 RECEIVED

From Register and Receiver
Land Office, Natchitoches, La.
June 3rd. 1891.

Transmitting application of
Stephen N. Grant to enter,
under the Homestead Laws, as
provided by Section 2 of the Act
of Congress, approved February 8th,
1891.

9-8140

28/397 F Mar

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396576-12

F.

M

JMP

WOC

Doc. 9-8140

DEPARTMENT OF THE INTERIOR,

General Land Office,

Washington, D. C. February 26, 1896.

Address only the
Commissioner of the General
Land Office.

STEPHEN N. GRANT
vs.
NEW ORLEANS PAC. RY. CO.

Involving S $\frac{1}{2}$ NW $\frac{1}{4}$ &
N $\frac{1}{2}$ SW $\frac{1}{4}$, Sec. 3, T. 3
N. R. 7 W.

Register and Receiver,
Natchitoches, Louisiana.

Sirs:

I have considered the above entitled case. The tracts in question are within the primary limits of the grant under the Act of March 3, 1871, (16 Stat., 379), for the New Orleans, Baton Rouge and Vicksburg Railroad Company, which company assigned its rights to the New Orleans Pacific Railway Company, and by Act of February 8th, 1887, (24 Stat.

391) the assignment was confirmed as to a portion of the grant, and the remainder forfeited and the land restored to the public domain.

The tracts are coterminous with the portion of the grant confirmed to the New Orleans Pacific Railway Company, and opposite the portion of the road definitely located, November 17—1882.

The tracts were listed by the company, November 8, 1883, and patent issued thereon, March 3, 1885.

On or about February 20, 1891, Stephen N. Grant applied to enter the tracts under the homestead laws, the Company was notified and filed its objection and thereupon, you ordered a hearing for April 6, 1891, before your office.

On the day appointed, Grant appeared with his witnesses and submitted testimony, but the company was not represented.

From your decision in favor of the homestead claimant, the company appealed.

I fail to find in the record any evidence of service of notice on the company of the order for said hearing, but inasmuch, however, as the company appealed from your decision on its merits, this objection which appears on the face of the records, will be declared to be waived.

There is no notice that the company served notice of its appeal on the opposing party and in the absence of such evidence said appeal must be and is hereby, dismissed.

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396576-13-14

276-277

The dismissal of the appeal, however, does not preclude a consideration of the record to ascertain whether said Grant is entitled to enter said tracts.

The testimony shows that the land has been occupied and cultivated, continuously, for fifteen years prior to the hearing, that there have been a number of transfers made for said tracts; that the claimant purchased in the year 1885, from a prior settler and established his residence thereon and has continuously cultivated the land.

As the land was occupied by an actual settler at the

date of definite location, and is in the possession of the home-
stead claimant, as the assignee of such settler, the claim is
protected by the second section of the Act of February 8th,
1887, and the land was erroneously patented to the railway
company.

In accordance with the agreement filed by the company and embodied in Departmental letter of December 15, 1892, the claim of the company is rejected and the case closed.

The company will be requested to reconvey the tracts to the United States, in order that said Stephen N. Grant may enter the same under the homestead laws.

Advise Grant hereof. The attorney for the company will be advised by this office.

Very respectfully,

E. A. BOWERS.
Asst. Commissioner.

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396576-26

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Doc. 9-8140.

**DEPARTMENT OF THE INTERIOR,
General Land Office.**

F C L Washington, D. C. February 26, 1895.

Address only the
Commissioner of the General
Land Office,

STEPHEN A. GRANT,
vs.
NEW ORLEANS PACIFIC
RY. CO. | Involving S $\frac{1}{2}$ NW $\frac{1}{4}$ & N $\frac{1}{2}$
SW $\frac{1}{4}$ Sec. 3, T. 3 N. R. 7 W.,
Natchitoches Land District.

Mr. D. A. McKnight,
Atty. for New Orleans Pac. Ry. Co.

Siri—

A decision having this day been rendered adverse to the company in the above entitled case, I have to request that,

in accordance with the agreement filed by the Company, and embodied in Departmental letter of December 16, 1892, (15 L. D., 376) you call upon the company to make due restoration of the tracts described in the caption hereof, to the United States, in order that Stephen A. Grant may enter the same under the homestead laws.

Very respectfully,

E. A. BOWERS,
Asst. Commissioner.

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396576-25

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WJM

DEPARTMENT OF THE INTERIOR,
General Land Office,

F. Washington, D. C., February 20, 1896.

F. I. W.

Address only the
Commissioner of the General
Land Office.

The Honorable,
The Secretary of the Interior,

Sir:

In accordance with your verbal instructions, I have the honor to report, in duplicate, a list of lands erroneously patented to the New Orleans Pacific Railway Company.

In nearly every case reported herein, a hearing has been had and the testimony taken shows that the tracts were excepted from the operation of the grand and not subject to listing or selection by said company.

In submitting the matter to the Department for consideration, I desire to call attention to office letter of Dec. 10, 1895, reporting a number of cases where the land had

been erroneously patented to the company, and recommending the institution of suit for the recovery of title thereto.

Very respectfully,

S. W. LAMOREAUX,
Commissioner.

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GOVT'S EX. "D"

"These exhibits show that on February 27, 1901, the United States Government, acting through The Attorney General and the United States Attorney for the Western District of Louisiana, filed its bill in Equity, entitled: "United States of America vs. New Orleans Pacific Railway Company, et al.," the same being No. 16 on the Equity docket of the United States then Circuit now District Court for the Western District of Louisiana.

This bill was a suit by the Government against the New Orleans Pacific Railway Company, a Louisiana corporation, alleged to be within the jurisdiction of the Court, and the following non-residents of the State of Louisiana: John F. Dillon and Amos H. Calef, residents of New York City; George J. Gould, resident of New York and New Jersey, sued individually and as heir and executor of Jay Gould, deceased; Edwin Gould; Howard Gould and Frank Gould, residents of the City of New York, sued individually and as heirs of Jay Gould; Anna Gould, wife of Count Boni de Castelane, a resident of Paris; Daniel F. Marsh, a resident of the State of Connecticut; A. Baldwin, a resident of New Orleans; J. B. Watkins, a resident of Lawrence, Kansas; and the following, whose residences were unknown, Charles Paulet, John F. Eddy and William D. Dewing.

In the bill, the Government prayed for a decree cancelling patents to some hundred and fifty tracts of land, including the land in controversy in the case at bar, alleging that said tracts were erroneously patented to the said railway company under its grant from the United States, on

the ground that said lands were, at the time of the definite location of the railroad, and at the date of the passage of the Act of Congress confirming the grant—February 8, 1887—occupied by actual settlers named in the bill of complaint and for which reason it was claimed the said lands were excepted from the grant, and the patents therefor issued erroneously.

Attached to the said bill of complaint was an order of the Court dated February 25, 1901, directing that those of the defendants, naming them (omitting, however, the New Orleans Pacific Railway Company), who were non-residents of the Western District of Louisiana, be ordered to "appear, plead and answer or demur by the _____ Monday of _____ 1901; and that this order be served upon them personally wherever found." The blanks in this order, in which were to be inserted the day of the month and the name of the month on which the said defendants were commanded to appear and answer, were not filled in but were left blank, and such order did not include among such non-resident defendants, the New Orleans Pacific Railway Company, which, however, as a matter of fact, was comiciled in the City of New Orleans, without the Western District of Louisiana.

A subpoena in chancery in said suit No. 16 was issued on the 27th day of February, 1901, by the Clerk of the United States Circuit Court for the Western District of Louisiana, directed the United States Marshal for the Eastern District of Louisiana, commanding him to summon various defendants, including: "The New Orleans Pacific Railway Company, New Orleans, La.; Robert Strong, General Agent, New Orleans, La.; Charles M. Green, Receiver of the New Orleans Pacific Railway Company, New Orleans, La., to appear before the Honorable Judge of the Fifth Judicial Circuit of the United States of America at a Circuit Court to be holden at the City of Alexandria, La., on the first Monday of April, 1901." Robert Strong, General Agent, and Charles M. Green, stated in the subpoena to be officers and representatives of the New Orleans Pacific Railway Company, are not mentioned in the bill in Equity nor in the order

of the Court directing service above noted. The return on this subpoena shows personal service on Charles M. Green, Receiver, and service on Robert Strong, General Agent, "by handing the same to W. R. Elliott, Secretary of said Company, in person at the office of said Company," on the 28th day of February, 1901.

130 On March 27, 1901, several defendants, including Charles M. Green, Receiver of the New Orleans Pacific Railway Company, and the New Orleans Pacific Railway Company, filed in the United States District Court for the Western District of Louisiana in this cause a petition praying for limited appearance, upon which an order was entered by the Court allowing the same and authorizing them to make "a limited appearance in this cause for the purpose of contesting the legality and regularity of the process issued against them in the said cause, and the regularity and validity of the service thereon," which said appearance was duly made on the same date.

On the 25th day of May, 1903, the following entry was made on the minutes of the United States District Court for the Western District of Louisiana, Alexandria Division: "United States vs. New Orleans Pacific Railway Company, No. 16. This cause came on at this time to be heard upon the motion of defendants to dismiss the suit for want of proper service, and after argument of counsel the Court ordered that supplemental process issue and be served upon the defendants, to-wit, an order of the Court conforming to the first order with change of dates, directing them to appear." The New Orleans Pacific Railway Company was not named in this order, but Charles M. Green, Receiver, and Robert Strong, Vice-President, were served on June 29, 1903, with a copy of an order of Court in this cause ordering and commanding them to appear and answer by the first Monday of September, 1903, the said order reciting their non-residence from the jurisdiction of the Court, and commanding the service upon them wherever found.

On September 25, 1903, by leave of the Court obtained, various defendants, including the New Orleans Pacific Rail-

way Company and Charles M. Green, Receiver, made a limited appearance in this cause for the purpose of contesting the legality and validity of the process served upon them, and for that purpose only, alleging themselves to be non-residents of the Western District of Louisiana, moved the Court to vacate, annul and set aside the process served upon them, on the ground that no valid order had ever been entered commanding them to appear and plead to said bill; that the only order ever entered and signed upon said bill was the original order of February 25, 1901, which left blank the day of the month and the name of the month upon which they were to appear and answer, and that what purported to be a copy of an order commanding them to appear and answer on the first Monday of September, 1903, was not in fact a valid order of this Court, for the reason that no such order had ever been entered and signed by the Court (what had actually been done was that the blank dates in the original order had been filled in and a copy thereof certified and served), and that such service was therefore illegal and void, and not such service as to compel defendants to appear and plead to said bill.

On May 23, 1904, the following minute was entered in the minutes of the United States Circuit Court for the Western District of Louisiana: "United States vs New Orleans Pacific Railway Company, No. 16. In this cause the Court sustained the motion to quash the service made upon the defendants, and ordered that the defendants named in the original order be cited to set forth therein to plead, answer or demur on the second Monday of September, 1904, at the City of Alexandria."

On May 25, 1904, an original order of Court was entered commanding the defendants named in the first order had upon this bill to appear and answer on the second Monday of September, 1904, in the City of Alexandria, in the Western District of Louisiana, and that this order be served upon said defendants wherever found; a copy of this order was served personally by the United States Marshal for the Eastern District of Louisiana on Robert Strong, Vice President of the New Orleans Pacific Railway Company on June

131 7th, 1904, and on Charles M. Green, Receiver of the
New Orleans Pacific Railway Company on June
20th, 1904.

On August 26th, 1904, various defendants, including the New Orleans Pacific Railway Company, through their solicitors, made appearance in this cause, and on the same date filed a general demurrer to the Government's bill.

On October 24, 1904, the New Orleans Pacific Railway Company filed an amended demurrer, by leave of the Court had, alleging as additional grounds for the dismissal of the suit, that the plaintiff was not entitled to maintain the action or have the relief prayed for, inasmuch as it appeared on the face of the record that the suit was not brought within five years from the passage of an act of Congress entitled: "An Act to provide for the extension of time within which suits may be brought to vacate and annul patents and for other purposes," approved March 2, 1896 (29 Statutes at Large, c. 39, p. 42), which demurrers, together with similar demurrers filed by the other defendants, were by the Court on the 17th day of March, 1905, overruled, and the said defendants assigned to answer the bill on the 22nd day of May, 1905, at Alexandria, La.

Various answers and pleas were filed on behalf of the several defendants, and on May 22, 1905, the New Orleans Pacific Railway Company filed a plea to the whole bill, setting up, in bar of the Government's action, the act of Congress approved March 2, 1896, (29 Statutes at Large, 42), especially averring that the time provided in such statute, within which the Government might bring a suit to cancel a patent to lands erroneously issued under any railroad grant had elapsed prior to the 25th day of May, 1904, not until which date, it was contended, was the Government's suit herein brought or this defendant served with valid legal process so as to interrupt the running of said prescription, and that prior to September, 1904, no appearances or pleadings had been made in the cause on behalf of this defendant, by which the said prescription might be interrupted or the Court acquire jurisdiction over this defendant.

On February 19, 1906, the Government, through the United States Attorney, filed a replication of the United States of America, complainant, to this plea of the New Orleans Pacific Railway Company, defendant; November 6, 1913, the United States Attorney filed a motion to strike out the plea of the New Orleans Pacific Railway Company filed on May 22, 1905, as above set forth, on the ground that the same was a mere repetition of the amended demurrer of said Company, which had been filed on October 24, 1904, and overruled by the Court.

On November 6, 1913, the said motion of the Government to strike out the plea of the New Orleans Pacific Railway Company was overruled by the Court and the said plea referred to the merits of the cause, with leave to incorporate the same in its answer, to be filed within forty days, within which time, to-wit, on December 16, 1913, the New Orleans Pacific Railway Company filed its answer.

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GOVT'S EX. "E"

LETTER FROM H. L. MULDROW, ACTING
SECRETARY,
to
REGISTER AND RECEIVER.

"I have to call your attention to the act of Congress approved February 8, 1887 (copy attached), entitled "An act to declare a forfeiture of lands granted to the New Orleans, Baton Rouge & Vicksburg Railroad Company to confirm title to certain lands, and for other purposes."

The first section of the act declared a forfeiture of, and restored to the public domain, all lands lying east of the Mississippi River which were granted to the New Orleans, Baton Rouge & Vicksburg Railroad Company by act of March 3, 1871, and also of all those on the west side of the river lying opposite to and coterminous with that part of the road which was completed on the 5th day of January, 1881, or that portion between New Orleans and White Castle.

The second section confirms to the New Orleans Pacific Railroad Company the title to the lands granted by said Act of March 3, 1871, and not declared forfeited by the 1st section, but provides that all of the lands that were occupied by actual settlers at the date of the definite location of the road and were still in their possession or in the possession of their heirs or assigns, should be held and deemed excepted from the grant and subject to entry under the laws of the United States. This provision applies to the patented as well as to the unpatented lands.

The department has decided that the dates of the definite location are specifically determined by the act of February 8, 1887, to-wit: October 17, 1881, for the portions of the road from a point in Township 2 N., Range 1 East, to a point in Township 4 N., Range 2 W., and from Shreveport to a point in Township 10 N., R. 12 W., and November 17, 1882, for the balance of the road. The 20-mile lateral limits of the grant and the terminal limits of each of the sections as definitely located and constructed are shown by yellow shading upon the diagram furnished you with office letter of October 15, 1883. When claimants under this section present proper applications to enter, you will notify the company thereof, and allow thirty days in which to file objections. If no objection is made within the time allowed, you will allow the entry, and in making your returns thereof you will transmit, with the entry papers, the documents showing the previous action taken.

If the company should object, you will order a hearing in the usual manner, and, upon the conclusion of the trial, transmit the testimony to this office accompanied by your joint opinion thereon.

The third section provided that the confirmation of the grant made by the second section should take effect when the company should accept the provisions of this act in the manner prescribed, and agree to discharge all the duties and obligations imposed by the act of March 3, 1871.

The acceptance and agreement on the part of the company were filed with the Secretary of the Interior, April 20, 1887, and the relinquishment and confirmation of the

grant provided for in the second section of the act went into effect on that day.

The fourth section directs the Secretary of the Interior to establish such rules and regulations, in issuing patents for the lands confirmed to the company by this act, as will enable persons who were in actual occupancy of any portion thereof on December 1, 1884, and who are qualified pre-emption or homestead claimants, to secure title to the land held by them not to exceed one-quarter section
133 and not less than one-sixteenth of a section, on payment to the company at the rate of two dollars per acre for the land occupied; one third to be paid in cash and the balance in such equal annual installments as the Secretary of the Interior shall prescribe.

The fifth section directs the Secretary of the Interior to make all needful rules and regulations for carrying this action into effect, and authorizes him to direct that payments for the lands purchased under the fourth section may be made in any number of annual installments, not exceeding four, from the date of the sale, with interest thereon, not exceeding six per centum per annum.

Upon the receipt of any proper application to purchase under the fourth section of the act, you will notify the company thereof and allow thirty days within which to file objections.

If no objection is made the applicant will be held and deemed to have a valid claim and right of purchase in the land applied for, and you will so notify the company. Should the company object, you will order a hearing and proceed as directed under section 2.

The sixth section of the act authorizes and instructs the Secretary of the Interior to apply the provisions of the second, third, fourth and fifth sections to any lands that have been patented under the railroad grant of March 3, 1871, and to protect any and all settlers on said lands in all of their rights under said sections.

In all cases under section 2 where the rights of entry under the laws of the United States shall have been fully established to lands which have been patented to the company, the latter will be required to reconvey such lands to

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the United States, to the end that no cloud may rest upon the title of the entryman.

In cases where the right of persons under the fourth section of the act shall be established, the railroad company will be required, either to convey the land to the applicants upon receipt of the first payment, and secure itself for the deferred payment by liens upon the lands sold, or to enter into such contracts to convey the lands upon receipt of the final installment paid in the manner below prescribed, as shall be satisfactory to this office.

The fourth section prescribed that purchasers thereunder shall pay one-third of the purchase money in cash. Under the authority given the Secretary of the Interior, the balance of the purchase money shall be paid in four equal annual installments from the date of the sale and interest on deferred payments shall be at the rate of six per centum per annum.

Purchasers coming within the provision of this section may at any time make payment of the whole, or any equal annual installment of the purchase money.

Application to enter under the second section, and to purchase under the fourth section, should be accompanied by the corroborated affidavit of the claimant, setting forth the facts respecting his settlement, and residence upon, and cultivation of the land claimed.

Approved June 8, 1887.

H. L. MULDROW,
Acting Secretary.

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GOVT'S EX. "F"

CIRCULAR—ACT OF MARCH 3, 1887.
DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., February 13, 1889.

REGISTERS AND RECEIVERS, UNITED STATES
LAND OFFICES:

GENTLEMEN: The following instructions under the act of Congress approved March 3, 1887 (24 Stat., 556), are forwarded for your guidance.

THE FIRST SECTION

Directs that all railroad land grants not adjusted heretofore shall be adjusted immediately, that is without unnecessary delay. The duties thereunder pertain to the General Land Office and Department of the Interior.

THE SECOND SECTION

Provides for the recovery by the United States of title to lands which from any cause have been erroneously certified or patented "to or for the use or benefit of any company" on account of a railroad grant, whenever the fact may be ascertained that a certificate or patent has been erroneously issued, and prescribes the duties of the secretary of the Interior and Attorney-General in connection

THE THIRD SECTION

Provides "That, if in the adjustment of said grants, it shall appear that the homestead or pre-emption entry of any bona fide settler has been erroneously cancelled on account of any railroad grant, or the withdrawal of public lands from market, such settler, upon application, shall be reinstated in all his rights and allowed to perfect his entry by complying with the public land laws: PROVIDED, that he has not located another claim or made an entry in lieu of the one so erroneously canceled; and PROVIDED, also, that he did not voluntarily abandon said original entry; and PROVIDED FURTHER, that if any of said settlers do not renew their application to be reinstated within a reasonable time, to be fixed by the Secretary of the Interior, then all such unclaimed lands shall be disposed of under the public land laws, with priority of right given to bona fide purchasers of said unclaimed land, if any, and if there be no such purchasers then to bona fide settlers residing thereon."

Three classes of persons are provided for under this section.

First. Bona fide settlers whose homestead or pre-emption entries have been erroneously cancelled on account of a railroad grant or withdrawal.

Second. Bona fide purchasers of such unclaimed lands.

Third. Bona fide settlers residing thereon.

The rights of the several classes to the lands referred to in the section are successive in the order stated in the section; the first in right is the homestead or preemption settler whose entry has been wrongfully canceled. If he elects to assert his right, and has not been disqualified by locating another claim or making another entry in lieu of the entry erroneously cancelled, his right is absolute, and the successive rights of the remaining two classes cannot attach if he lawfully asserts his claim. If he fail to claim the land, or is disqualified under the act, the second class of persons, who are the bona fide purchasers of the land unclaimed by him, attach, and have precedence over the third class. The bona fide purchasers here referred to are those who, without knowledge of wrong or error, have purchased from the railroad company lands which have been previously entered by a preemption or homestead settler, whose entry has been erroneously canceled, as described in the first clause of the third section, and which land the preemption or homestead settler did not elect to claim after the recovery by the proceedings prescribed by the second section of the act.—

ATTORNEY GENERAL'S OPINION,

Niv. 17, 1887.

(L. D., 272).

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Parties of the first class desiring to avail themselves of the benefits of this section should present their applications without unnecessary delay, after notice of intention as required by the act of March 3, 1879, in pre-emption and homestead cases. The application must in every instance be accompanied by proof showing:

1. The facts respecting the date of the applicant's settlement, duration of residence, and value of improvements upon the public land.
2. Whether he has located on any other claim under any of the laws of the United States authorizing settlements upon public lands.
3. Whether he has abandoned the land embraced in

his canceled entry or filing, if so, the cause which led to the abandonment.

4. Whether any other person or persons are residing upon the land.

5. That such persons as may be so residing upon the land have been notified of the intention of the claimant to apply for the re-instatement of his filing or entry, and the manner of giving such notice must be shown.

Should an adverse claimant appear to dispute or contest the right of re-instatement proceedings will be had in accordance with the Rules of Practice as in ordinary contests.

While the act contains no provisions relative to persons whose entries or filings have not been canceled, but whose lands have been certified, or patented on account of railroad grants, it follows as a matter of course, that their rights should be protected, and the mode of procedure in such cases will be the same as in the cases where cancellation has been made, except that the parties should apply to make final proof and payment instead of for re-instatement of entry; but in such case proceedings will be deferred until the title has been restored to the United States as provided by section two of said act. The instructions of Nov. 22, 1887 (6 L. D., 276), under this section, are hereby modified in accordance with the foregoing.

Proceedings on applications by parties of the second class will be governed by instructions under the fourth section.

Applicants of the third class will be required to submit evidence, in addition to that relating to their own settlement or claims, showing whether there are persons of the first or second class residing upon, in possession of, or claiming lands.

THE FOURTH SECTION

Relates to all lands which have been erroneously certified or patented on account of railroad grants, except those mentioned in the third section, and by the grantee company sold to citizens or to persons who have declared their inten-

tion to become citizens of the United States; and provided that after the title to such lands has been restored to the United States as contemplated by the second section of the act, persons who have purchased such land in good faith, their heirs or assigns, shall be entitled to the lands, upon making proof at the proper land office, whereupon patents shall issue relating back to the date of the original certification or patenting, and the grantee company will be required to pay the United States for such lands at the price at which other similar lands are legally held by the Government.

The purchaser from the company is not debarred by the act from recovering from the company the amount of purchase money paid by him less the amount paid by the company to the United States for the land.

A mortgage or pledge of such lands is not a sale within the intention of the act.

No forfeiture is declared by this act against any land grant for conditions broken (and no entry is authorized for lands legally within such grant), but no rights of the United States on account of breach of contract are waived by the act.

An applicant for land under this section will be required to publish notice of his intention to make proof as in preemption and homestead cases, and the proof must show:

1. That he is, or has declared his intention to become, a citizen of the United States.
2. That he is a bona fide purchaser from the company or some person claiming title under it, and the character of the instrument conveying the land to him.
3. The amount of purchase money paid to the company.
4. What part, if any, of the purchase money paid to the company has been refunded to him or any person acting as his agent.
- 136 5. Whether he has instituted proceedings against the company for the recovery of any portion of the purchase money; if so, for what portion.

6. The value and character of the improvements, if any, made or acquired by him upon the land.

7. Whether there is any person of the first class under the third section entitled to the right of entry under the pre-emption or homestead laws.

Upon the submission of satisfactory proof as prescribed above, the register will issue certificate, in duplicate—numbered in the regular cash series—with annotations thereon showing that the entry is allowed without payment under the fourth section of the act of March 3, 1887. (24 Stat. 556).

THE FIFTH SECTION

Relates to lands within the limits of railroad grants, coterminous with constructed portions of the lines of road, not conveyed on account of, but excepted from, the grants.

Under this section, when the company has sold to citizens of the United States, or persons who have declared their intention to become such citizens, the numbered sections prescribed in the grant and coterminous with the constructed portions of the road, within either the granted or indemnity limits, and which upon the adjustment of the grant are shown to be excepted from the operation of the grant, it shall be lawful for such purchasers (if their purchases are bona fide) to purchase said land from the Government by payment of the government price for like lands, unless said lands were at the date of purchase in the bona fide occupancy of adverse claimants under the preemption or homestead laws, in which case the preemptor or homestead claimant may be permitted to perfect his proof unless he has since voluntarily abandoned the land.

Under the last proviso of said section, however, if a settlement was made on said lands subsequent to December 1, 1882, by persons claiming the same under the settlement laws of the United States, it will defeat the right of the purchaser, whether said purchase was made prior or subsequent to December 1, 1882, and the settler will be allowed to prove up for said lands as in other like cases.

Applicants to purchase under this section will be required to publish notice of intention as directed by instructions under the third and fourth sections, and the proof must show:

1. That the tract was of the numbered sections prescribed by the grant.
2. That it was coterminous with constructed parts of said road.
3. That it was sold by the company to the applicant, or one under whom he claims, as a part of its grant.
4. That it was excepted from the operation of the grant.
5. That at the date of said sale it was not in bona fide occupancy of adverse claimants under the preemption or homestead laws, whose claims and occupancy have not since been voluntarily abandoned.
6. That it has not been settled upon subsequent to the first day of December, 1882, by any person or persons claiming the right to enter the same under the settlement laws.
7. That the applicant is, or has declared his intention to become, a citizen of the United States.
8. And that he, or one under whom he claims, was a bona fide purchaser of the land from the company.

The proof upon these points being found satisfactory, the entry will be allowed and the usual cash certificate and receipts will be issued thereon reciting the fact that the entry is in accordance with the fifth section of the act of March 3, 1887, (24 Stat., 556).

No entry will be allowed under this section until it shall have been finally determined by this Department that the land was excepted from the grant.

THE SIXTH SECTION

Provides that when any such lands have been sold and conveyed as the property of the company for State and coun-

BLUEPRINT
TOO
LARGE
FOR
FILMING

ty taxes, and the grant to the company has been thereafter forfeited, the purchaser at such sale shall have the preference right for one year from the date of this act, and no longer, in which to purchase said lands from the United States by paying the Government's price for said lands, provided said lands were not previous to or at the time of the taking effect of such grant in the possession or subject to the right of an actual settler.

137 The period prescribed by the statute for presenting applications under this section having expired, instructions as to methods of procedure are deemed unnecessary.

THE SEVENTH SECTION

Authorizes the Secretary of the Interior to refuse to certify or convey lands on account of any railroad grant where it shall appear to him that to do otherwise would give to the grantee more lands than the granting act contemplated giving.

Very respectfully,

S. M. STOCKSLAGER,
Commissioner.

APPROVED:

WM. F. VILAS,
Secretary.

139

4-207

362033

Govt's Exhibit "H"

"B" DEPARTMENT OF THE INTERIOR,
CRGD General Land Office.

Washington, D. C., Jan. 14, 1914.

I hereby certify that the annexed copy of railroad patent No. 2, is a true and literal exemplification from the record on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

(SEAL)

JOHN McPHAUL

Acting Assistant Commissioner of the General Land Office.

Filed Nov. 6-1915,

LEROY B. GULOTTA, Clerk,

U. S. District Court,

West Dist. of Louisiana.

140

428 \$1.45

THE UNITED STATES OF AMERICA

No. 2.

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS, by the Act of Congress approved March 3, 1871, entitled "An Act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," there was granted to said Texas Pacific Railroad Company, for the purpose of aiding in the construction of its railroad and telegraph line, "every alternate Section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as such line may be adopted by said company, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad in California, where the same shall not have been sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed.

AND WHEREAS, by Section twenty-two of said Act, there was granted to the New Orleans, Baton Rouge and

Vicksburg Railroad Company, chartered by the State of Louisiana, its successors and assigns, in aid of the construction of a railroad from New Orleans to Baton Rouge, thence by the way of Alexandria, in said State, to connect with said Texas Pacific Railroad at its eastern terminus, the same number of alternate sections of public lands per mile, in the State of Louisiana, as were by said Act granted in the State of California, to said Texas Pacific Railroad Company:

AND WHEREAS, said New Orleans, Baton Rouge and Vicksburg Railroad Company did, on the fifth day of January, one thousand eight hundred and eighty-one, assign and convey all the right, title and interest in, or to the grant of lands aforesaid, to the New Orleans Pacific Railway Company, chartered by the State of Louisiana, as shown by the original deed of assignment filed in the General Land Office

February 25, 1881:

141 AND WHEREAS, said New Orleans, Baton Rouge and Vicksburg Railroad Company did on the fifth day of January, one thousand, eight hundred and eighty-one, assign and convey all its right, title and interest in or to the grant of lands aforesaid, to the New Orleans Pacific Railway Company, chartered by the State of Louisiana, as shown by the original deed of assignment filed in the General Land Office February 25, 1881.

AND WHEREAS, on March 19, 1883, the Secretary of the Interior transmitted to the General Land Office an official statement showing that the New Orleans Pacific Railway Company had constructed and equipped, in the manner required by said Act of March 3, 1871, a railroad from White Castle, in the State of Louisiana, to a connection with the Texas and Pacific Railway in the City of Shreveport, in said State, a distance of two hundred and sixty miles, and that pursuant to the report of the Commissioner appointed under the provisions of Section Eighteen of said Act, said railroad had been accepted by the President in conformity with said Act.

AND WHEREAS, certain tracts of lands in the State of Louisiana have been selected under the Act aforesaid by

Felix Reynaud, the duly authorized land agent of the New Orleans Pacific Railway Company, as shown by his original list of selections in the Natchitoches District, dated December 29, 1883, and certified by the register and receiver of the land office in said district on the same date. The said tracts of land lie coterminous with the constructed line of road and are particularly described as follows, to-wit:

NORTH OF BASE LINE AND WEST OF LOUISIANA PRINCIPAL MERIDIAN, LOUISIANA.

NATCHITOCHES DISTRICT. TWENTY MILE LIMITS.

TOWNSHIP THREE, RANGE SEVEN.

The Southwest Quarter and the North Half of Section Three.

And other lands.

The said tracts as described in the foregoing, make the aggregate area of (295,162.33) two hundred and ninety-five thousand, one hundred and sixty-two acres and thirty-three hundredths of an acre.

142 **NOW, KNOW YE,** That the United States of America, in consideration of the premises and pursuant to the said act of Congress, have given and granted, and by these presents, DO GIVE AND GRANT unto the said New Orleans Pacific Railway Company, successors and assigns, as aforesaid, and to its successors, the tracts of land described in the foregoing, excluding and excepting, however, all "mineral" lands, should any such be found in the tracts aforesaid; but this exclusion and exception, according to the terms of the "Statute" shall not be held to include iron or coal."

TO HAVE AND TO HOLD the same, with the appurtenances, unto the said New Orleans Pacific Railway Company, and to its successors and assigns forever.

IN TESTIMONY WHEREOF, I, Chester A. Arthur, President of the United States, have caused these letters to be made patent and the Seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, this
 third day of March, in the year of our Lord, one
 (SEAL) thousand eight hundred and eighty-five, and of
 the Independence of the United States the one
 hundred and ninth.

By the President: CHESTER A. ARTHUR,
 By M. McKEAN,
 Secretary.

Fee for prepar- ing and recording paid March 3 '85 by Hon. Wm. H. Barnum, See Money Letter 32363.	}	S. W. CLARK Recorder of the General Land Office.
---	---	--

Patent trans. with letter of March 3, 1885, to Hon. Wm. H. Barnum, Washing- ton, D. C.	}	Receipt ack'd by Judge Jno. F. Dillon, March 3, '85.—(22730.)
---	---	---

143 IN REPLY PLEASE REFER TO....."F"
 Copy.
 Govt's Exhibit I.

DEPARTMENT OF THE INTERIOR
 General Land Office

Washington, D. C., Novr. 29th, 1871.

Address only the
 Commissioner of the General
 Land Office.

Register and Receiver,
 New Orleans, La.

Gentlemen:—

By act 3d March 1871, U. S. Stat., Vol. 16, page 579.
 Sec. 22, there is granted to the New Orleans, Baton Rouge

and Vicksburg Railroad to aid in its construction from New Orleans to Baton Rouge, thence by the way of Alexandria, to connect with the Texas Pacific Railroad Company at its eastern terminus, every alternate section of public land not mineral, designated by odd numbers, to the amount of ten alternate sections per mile on each side of said railroad line where the same shall not have been sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed. In case any of said lands shall have been sold, reserved, occupied or pre-empted or otherwise disposed of, other lands shall be selected in lieu thereof by said company, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers not more than ten miles beyond the limits of said alternate sections, first above named.

I now enclose a diagram of that part of the road in your district with the twenty mile granted limit and the ten mile indemnity limits, and you are requested to withdraw from further entry or sale all the odd numbered sections of land within these limits. The even numbered sections of land within the twenty mile limits you will hold at the double minimum of \$2.50 per acre and allow homestead entries at that ratability only.

144 When homestead entries have been made prior to this withdrawal the parties will hold these lands at the minimum price, but should the entries be canceled for abandonment or other cause, the lands will be, when again made subject to entry double minimum.

This order in no manner affects the even sections in the indemnity limits.

You will consider these instructions as taking effect on the day of their receipt by you, and you are requested to immediately acknowledge the date of their receipt.

Very respectfully,

(Signed) WILLIS DRUMMOND,

COPY-HMC

Commissioner.

145 IN REPLY PLEASE REFER TO....."F"

WKM

Copy

Government Exhibit "J"

DEPARTMENT OF THE INTERIOR.

General Land Office

Washington, D. C. November 29, 1871.

Address only the
Commissioner of the General
Land Office.

Register and Receiver,
Natchitoches, La.

Gentlemen:—

By act of 3d March 1871, U. S. Stat., Vol. 16, page 579 Sec. 22, there is granted to the New Orleans Baton Rouge and Vicksburg Railroad to aid in its construction from New Orleans to Baton Rouge, thence by way of Alexandria to connect with the Texas Pacific Railroad Company at its eastern terminus, every alternate section of public land not mineral, designated by odd numbers, to the amount of ten alternate sections per mile on each side of said railroad line, where the same shall not have been sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed.

In case any of said land shall have been sold, reserved, occupied or pre-empted or otherwise disposoed of, other lands shall be selected in lieu thereof by said company under the direction of the Secretary of the Interior in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections first above named.

I now enclose you a diagram of that part of the road in your district north to Shreveport with the 20-mile granted

limits and the ten mile indemnity limits, and you are requested to withdraw from further entry or sale all the odd numbered sections of land falling within those limits. The even-numbered sections of land within the 20-mile limits you will hold at the double minimum of \$2.50 per acre and allow the homestead entries at that ratability only.

Where homestead entries have been made prior to this withdrawal the parties will hold their lands at the minimum price, but should the entries be canceled for abandonment or other cause, the land will be, when again made subject to entry, double minimum.

This order in no manner affects the even sections in the indemnity limits.

You will consider these instructions as taking effect on the day of their receipt by you, and you are requested to immediately acknowledge the date of their receipt.

Very respectfully,

(Signed) WILLIS S. DRUMMOND,
COPY-HMC Commissioner.

147

4-207

R. J. F. M.

"F"

Government Exhibit "K"

RJFM

R.J.F.M.

DEPARTMENT OF THE INTERIOR,

General Land Office,

Washington, D. C., September 16, 1915.

I hereby certify that the annexed copy of so much
of a list of lands, selected November 8, 1883, by the New
Orleans Pacific Railway Company at the local office at
Natchitoches, Louisiana as relates to the portion shown

thereon, is a true and literal exemplification from the original on file in this office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington,
(SEAL) on the day and year above written.

C. M. BRUCE,
Assistant Commissioner of the General
Land Office.

Filed Nov. 6, 1915,
LEROY B. GULOTTA, Clerk,
U. S. District Court,
West Dist. of Louisiana.

148 List No. 1, Natchitoches, La.,
 November 8, 1883.

NORTH OF BASE LINE AND WEST OF LA. PRINCIPAL MERIDIAN,
NEW ORLEANS PACIFIC
RAILROAD GRANT.

Posted Dec. 7/83
B.M.P.

.....
State of Louisiana, United States Land Office
Natchitoches, La., November 8th, 1883.

The New Orleans Pacific Railway Company, assignee of the New Orleans, Baton Rouge and Vicksburg Rail Road Company, under and by virtue of the Act of Congress, entitled "An Act to incorporate the Texas and Pacific Railway Company, and to aid in the construction of its road, and for other purposes." Approved March 3, 1871; and under and in pursuance of the rules and regulations prescribed by the Commissioner of the General Land Office, hereby makes and files the following list of selections of public

lands claimed by the said Company as enuring to it, and to which it is entitled under and by virtue of the grants and provisions of the said Act of Congress, and the location of the line of route of the construction of said company; being for the granted sections (20 Miles) of the same; commencing at Township No. 1 N. of Range No. 4 West and ending at its junction with the Texas and Pacific Railway at Shreveport, the Selections being particularly described, as follows, to-wit:

* * * * *

149 North of base line and West of La. Principal
Meridian.

New Orleans Pacific

RAILROAD LIST.

No.	Parts of Section.	Section	Town ship.	Range.	Acres.	Re- marks.
x	x			x		x
	All of	3	3	7	631.44	
x	x			x		x

State of Louisiana, }
Parish of Natchitoches. } United States Land Office.

I, Felix Reynaud, being duly, depose and say, that I am the Land Agent of the New Orleans Pacific Railway Co. formerly the New Orleans, Baton Rouge and Vicksburg Railroad Co.; that the foregoing list of lands, which I hereby select, is a correct list of a portion of the public lands claimed by the said New Orleans Pacific Railway Co..

as inuring to it, to aid in the construction of the New Orleans, Baton Rouge and Vicksburg Railroad, from New Orleans, for which a grant of lands was made by the Act of Congress approved March 3rd, 1871; that the said lands are vacant, unappropriated and are not interdicted mineral nor reserved lands, and are of the character contemplated by the grant, within the limits of twenty miles on each side of the line of route for a continuous distance of 328 miles (less 68 miles from New Orleans to White Castle) being for that section of said road starting from
 150 White Castle, La., and ending at Shreveport, La.

Sworn to and subscribed before
 me this 8th day of November,
 A. D. 1883.

A. E. LEMEE
 Receiver.

} The New Orleans Pa-
 cific Railway Company
 per Felix Reynaud
 Ag't & Atty in fact.

United States Land Office,
 Natchitoches, Louisiana,
 November 8th, 1883.

}

We hereby certify that we have carefully and critically examined the foregoing list of lands, claimed by the New Orleans Pacific Railway Co., under the grant to the New Orleans, Baton Rouge and Vicksburg Railroad Co., by Act of Congress, approved March 3, 1871, and selected November 8th, 1883, by Felix Reynaud, the duly authorized agent, and we have tested the accuracy of said list by the plats and records of this office, and that we find the same to be correct. And we further certify that the filing of said list is allowed and approved, and that the whole of said lands are surveyed public lands of the United States and within the limit of twenty miles on each side; and that the same are not, nor is any part thereof returned and denominated as mineral land or lands, nor claimed as swamp lands; nor is there any homestead pre-emption, State, or other valid claim to any portion of said lands on file or record in this office.

We further certify that the foregoing list shows an assessment of the fees payable to us allowed by the Act of Congress approved July 1st, 1864, and contemplated by the circular of instructions dated November 7th, 1879, addressed by the Commissioner of the General Land Office to Registers and Receivers of the United States Land Offices: and that the said company have paid to the undersigned, the Receiver the full sum of Four thousand three hundred and fifty-two dollars (\$4,352) in full payment and charge of said fees.

L. DUPLEIX, Register.
A. E. LEMEE, Receiver.

NOTED IN SELECTION DOCKET PAGE 128.

151

4-207

"F"

RJFM Government Exhibit "L"
R.J.F.M.

DEPARTMENT OF THE INTERIOR,
General Land Office,

Washington, D. C., September 16, 1915.

I hereby certify that the annexed copy of so much of a list of lands, approved March 3, 1885, by the Secretary of the Interior, under the grant of act of March 3, 1871, for the benefit of the New Orleans Pacific Railway Company, as relates to the portion shown thereon, is a true and literal exemplification from the original in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on
(SEAL) the day and year above written.

C. M. BRUCE
Assistant Commissioner of the General Land Office.

152 #1. } Patent issued Mar. 3, 1885.
 Approved Mar. 3, 1885. } (No. 2) Recorded in Vol. 8.
 } p. 428 to 491 inclusive.

LIST NO. "2"

**NEW ORLEANS PACIFIC RAILWAY
 GRANTED LIMIT
 NATCHITOCHES DISTRICT
 LOUISIANA.**

Copy sent to R & R with } Receipt ack'd by Register,
 letter of June 26, 1885. } July 3, '85.
 } (68653)

Noted in Tract Books

Sept. 28-1885 #2
 M. I. P.

No. 2, Field Work (\$5,104.79) Office work (\$1475.81)
 = \$6,580.60

153

**DEPARTMENT OF THE INTERIOR
 L. & R. R. Div.
 Mar. 3, 1885.**

*1 Department of the Interior,
 General Land Office,
 March 3d. 1885.

WHEREAS, By the Act of Congress, approved March 3, 1871, entitled "An Act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its

road, and for other purposes", there was granted to said Texas Pacific Railroad Company, for the purpose of aiding in the construction of its railroad and telegraph line, "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as such line may be adopted by said company, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad in California, where the same shall not have been sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed":

AND WHEREAS, by section twenty-two of said act, there was granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company, chartered by the State of Louisiana, its successors and assigns, in aid of the construction of a road from New Orleans to Baton Rouge, thence by the way of Alexandria, in said State to connect with said Texas Pacific Railroad at its eastern terminus, the same number of alternate sections of public lands per mile in the State of Louisiana, as were by the said Act granted in the State of California to said Texas Pacific Railroad Company:

AND WHEREAS, said New Orleans Baton Rouge and Vicksburg Railroad Company did on the fifth day of January, one thousand eight hundred and eighty-one, assign and convey all its right, title and interest in, or to the grant
 154 of lands aforesaid, to the New Orleans, Pacific Rail-
 way Company, chartered by the State of Louisiana,
 as shown by the original deed of assignment filed
 in the General Land Office, February 25, 1881:

AND WHEREAS, on March 19, 1883, The Secretary of the Interior transmitted to the General Land Office an official statement showing that the New Orleans Pacific Railway Company had constructed and equipped, in the manner required by said Act of March 3, 1871, a railroad from White Castle, in the State of Louisiana, to a connection with the Texas & Pacific Railway in the City of Shreve-

port, in said State, a distance of two hundred and sixty miles, and that pursuant to the report of the Commissioner appointed under the provisions of Section eighteen, of said Act, said railroad had been accepted by the President in conformity with said Act.

AND WHEREAS, certain tracts of land in the State of Louisiana, have been selected under the Act aforesaid by Felix Reynaud, the duly authorized land agent of the New Orleans Pacific Railway Company as shown by his original lists of selections in the Natchitoches District dated November 8, and December 29, 1883, and certified by the Register and Receiver of the land office in said district on the same dates. The said tracts of land lie coterminous with the constructed line of road and are particularly described as follows, to-wit:

*2

155 185848-4

NORTH OF BASE LINE AND WEST OF LOUISIANA
PRINCIPAL MERIDIAN, LA.

RAILROAD LIST.

No.	Parts of Section.	Sec- tion.	Town- ship.	Range	Acres	Remarks.
All of		1	3	7	666.40	
SE $\frac{1}{4}$, SE $\frac{1}{4}$, N $\frac{1}{2}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$ & N $\frac{1}{2}$		3	"	"	594.15	per plat
NE $\frac{1}{4}$, SE $\frac{1}{4}$.	11		"	"	40.07	
AND OTHER LANDS AGGREGATING IN ALL 295,162.33 ACRES.						

*1 Railroad Division,
General Land Office,
March 3, 1885.

I hereby certify that the foregoing List of Selections has been carefully examined and compared with the record of this office; that the tracts described therein are free from conflict, and inure to the New Orleans Pacific Railway Company under Act of March 3, 1871.

I further certify that the prescribed fees for surveying and selecting the said lands have been paid.

M. J. DRUMMOND,
Chief R. R. Division.

General Land Office,
March 2d. 1885.

I hereby certify that the foregoing list has been compared with the Swamp Land records of this office and found to be free from conflict.

D. T. PIERCE,
Chief of Swamp Land Division.

NOW THEREFORE as it has been found on a careful examination of the foregoing selections in connection with the authenticated maps of the survey of the New Orleans Pacific Railway route on file in the General Land Office, that they fall within the twenty miles lateral limits, so far as the records of the General Land Office show, are free from conflict, it is hereby recommended that the tracts in the foregoing, covering 295,162.33 acres, be approved and carried into patent, as a portion of the lands within the grant by the act aforesaid to the said New Orleans Pacific Railway Company, excluding however from the approval and from the transfer by the patent that may issue, all mineral lands, should any such be found in the tracts

aforesaid, but this exclusion, according to the terms of the Statute "shall not be held to include iron or coal".

March 3d. 1885. N. C. McFARLAND,
Commissioner.

To the Hon. H. M. Teller,
Secretary of the Interior.

**157 ADJUSTMENT OF RAILROAD GRANTS—ACT
OF MARCH 3, 1887.**

Govt. Exhibit "M"

INSTRUCTIONS.

(COPIED FROM 6th LAND DECISIONS, PAGE "276".)

Secretary Lemar to Acting Commissioner Stockslager, November 22, 1887.

The act of March 3, 1887, authorizes and directs the Secretary of the Interior to immediately adjust in accordance with the decisions of the supreme court each of the railroad land grants made by Congress to aid in the construction of railroads, and heretofore unadjusted.

The second section of said act provides—

That if it shall appear, upon the completion of such adjustments respectfully (respectively), or sooner, that lands have been, from any cause, heretofore erroneously certified or patented, by the United States, to or for the use or benefit of any company claiming by, through, or un-

der grant from the United States, to aid in the construction of a railroad, it shall be the duty of the Secretary of the Interior to thereupon demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits; and if such company shall neglect or fail to so reconvey such lands to the United States within ninety days after the aforesaid demand shall be made, it shall thereupon be the duty of the Attorney-General to commence and prosecute in the proper courts the necessary proceedings to cancel all patents, certification, or other evidence of title heretofore issued for such lands, and to restore the title thereof to the United States.

The provisions contained in this section confers no greater power upon the Secretary of the Interior than he possessed before the passage of that act, and which from time to time has been exercised by that official in recommending to the Attorney General that suits be brought to cancel patents appearing to have been erroneously certified or patented for the benefit of any railroad company.

The purpose of the act was to make that mandatory which before rested in the discretion of the Secretary in the exercise of his authority over the public lands. Heretofore the Secretary of the Interior might recommend and request the Attorney General to institute suits for the cancellation of patents, which in his judgment were erroneously issued for the benefit of any railroad company under its grants, and the Attorney General in the exercise of his authority might grant or refuse such request as in his judgment might seem proper, but, under the act above referred to, whenever it shall appear upon the completion of the adjustment of any railroad land grant, or sooner, that any lands have been erroneously certified or patented for the benefit of said company, it is made the imperative duty of the Secretary of the Interior to demand of said company a relinquishment or reconveyance to the United States of all such lands, and if the company neglects or fails to reconvey the same, it shall thereupon be the duty of the Attorney-General to commence and prosecute in the proper

courts necessary proceedings to cancel the patents for said lands, and to restore the title thereof to the United States.

Therefore, if in the adjustment of the grant of any road it should appear from the records in your office that any lands within either the granted or indemnity limits of such road have been erroneously certified or patented for the benefit of such company, either from an improper adjustment of the limits of said grant, or from the erroneous cancellation of any filing or entry, or from any cause whatever, you will report such facts to the Department for action thereon, stating fully and specifically the grounds upon which it is supposed such tracts were erroneously certified or patented, and whether said tracts are within the granted or indemnity limits of said road.

The third section of said act provides:

That if, in the adjustment of said grants, it shall appear that the

158 That if, in the adjustment of said grants, it shall appear that the homestead or pre-emption entry of any bona fide settler has been erroneously canceled on account of any railroad grant or the withdrawal of public lands from market, such settler upon application shall be reinstated in all his rights and allowed to perfect his entry by complying with the public land laws: Provided, That he has not located another claim or made an entry in lieu of the one so erroneously canceled: And provided also, That he did not voluntary abandon said original entry: And provided further, That if any of said settlers do not renew their application to be reinstated within a reasonable time, to be fixed by the Secretary of the Interior, then all such unclaimed lands shall be disposed of under the public land laws, with priority of right given to bona fide purchasers of said unclaimed lands, if any, and if there be no such purchasers, then to bona fide settlers residing thereon.

This section does not embrace any lands that have been certified or patented to the company, but has reference solely to lands, the rights and claims to which has heretofore been adjudicated in favor of the company as against

the right of a settler upon said lands, and which are still under the control and jurisdiction of the Department. The object and purpose of this section is to correct all decisions made by the Department or the General Land Office where it shall appear in the examination of any land grant heretofore unadjusted that the homestead or pre-emption entry of a bona fide settler was erroneously canceled. In such case a final decision of a former or the present Secretary is not only no longer a bar to the further consideration of the question decided, but it is made the duty of the Secretary to readjudicate the case, notwithstanding the former decision, whenever it appears that the pre-emption or homestead entry of any bona fide settler has been erroneously canceled on account of any railroad grant or of withdrawal of public lands from market.

In the adjustment of every grant to aid in the construction of railroads, you will make report upon all pre-emption and homestead entries of bona fide settlers that may in your judgment appear from the records of your office to have been erroneously canceled, either because the land is within the limits of the railroad grant, or because it had been withdrawn for indemnity purposes for said road, provided the right to the tract has been decided in favor of the company, and forward said report to the Department for consideration and action thereon, stating fully and specifically as to each particular tract, the grounds upon which you may determine that said pre-emption and homestead entries were erroneously canceled, and the right to the land erroneously decided in favor of the company; and upon filing said report you shall cause notice thereof to be given to both parties, advising them that said case will be held by this Department for thirty days before action, during which time they can make such showing as they may desire.

If in such report you should determine that the pre-emption or homestead entry of any bona fide settler has been erroneously canceled and the right to the land adjudged in favor of the railroad, and your decision thereon shall be sustained by the Department, after due notice the

land will then be subject to disposal as provided for in said section; that is, the settler whose entry was erroneously canceled, will be notified of his right to make application to be re-instated in all his rights, and if said settler shall make such application within a reasonable time, to be fixed by the Secretary of the Interior, in such notice, he shall be reinstated in all his rights; Provided that he shows affirmatively that he has not located another claim or made an entry in lieu of the one so erroneously canceled, and that he did not voluntarily abandon said original entry. If said settler should fail to make application within the time required, and to show that he has not located another claim or made an entry in lieu of the one so erroneously canceled, and that he did not voluntarily abandon said original entry, then all such unclaimed lands shall be disposed of under the public land laws, with priority of right given to bona fide purchasers of said unclaimed lands, if any, and if there be no such purchasers, then to bona fide settlers residing thereon.

The bona fide purchasers here referred to are those who, without knowledge of wrong or error, have purchased from the railroad company lands which had been previously entered by the pre-emption or homestead settler, whose entry has been erroneously canceled as described in the first clause of the third section, and which land the pre-emption or homestead settler did not elect to claim after recovery by the proceedings prescribed by the
159 second section of the act.

As to the lands which have been erroneously certified or patented to the company (being the lands referred to in the second section) the fourth section of the act provides for the disposal of such of those lands as may have been sold by the company to citizens of the United States, or persons who have declared their intention to become such citizens, upon the following conditions:

After such lands shall have been reconveyed to the government, or the title to the same recovered, the class of persons above referred to, so purchasing in good faith, their heirs or assigns, shall be entitled to the lands so purchased, upon making proof of such purchase at the proper

land office, within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants respectively shall have been adjusted; and patent shall issue to such persons, which shall relate back to the original certification or patenting. The section then provides that the Secretary of the Interior shall demand of the company payment for said lands, of an amount equal to the Government price of similar lands; and in case of the neglect or refusal of the company to make payment thereot within ninety days after demand, the Attorney General shall cause suits to be brought against the company for said amount. Under the act the purchaser of such lands from the company may recover from the company the purchase-money paid by him, less the amount paid by the company to the United States.

A mortgage or pledge of said lands by the company is not a sale, within the meaning of the act.

The object of this section is to confirm to the purchaser the title to the land therein referred to, upon making proof of such purchase, and that the purchaser has the qualifications required by the act, without requiring of the purchaser any further payment to the government of the purchase price of said land.

The fifth section of said act reads as follows:

That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: PROVIDED, that all lands shall be excepted from the provi-

sions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and to receive patents therefor: PROVIDED FURTHER, that this section shall not apply to lands settled upon subsequent to the first day of December, 1882, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

Under this section, when the company has sold to citizens of the United States or persons who have declared their intention to become such citizens, the numbered sections prescribed in the grant, and coterminous with the constructed portions of the road, within either the granted or indemnity limits, and which upon the adjustment of the grant are shown to be excepted from the operation of the grant, it shall be lawful for such purchasers—if their purchase is bona fide—to purchase said land from the government by payment of the government price for like lands, unless said lands were at the date of purchase in the bona fide occupation of adverse claimants under the pre-emption or homestead laws, in which case the pre-emptor or homestead claimant may be permitted to perfect his proof,

unless he has since voluntarily abandoned the land.

160 Under the last proviso of said section, however, if a settlement was made on said lands subsequent to December 1, 1882, by persons claiming the same under the settlement laws of the United States, it will defeat the right of the purchaser whether said purchase was made prior to or subsequent to December 1, 1882, and the settler will be allowed to prove up for said lands as in other like cases.

The sixth section provides that when any such lands have been sold and conveyed as the property of the company, for State and county taxes, and the grant to the

company has been thereafter forfeited, the purchasers at such sale shall have the preference right for one year from the date of the act in which to purchase said lands from the United States, by paying the government price for said lands, provided said lands were not, previous to or at the time of the taking effect of such grant, in the possession of or subject to the right of an actual settler.

The seventh section provides—

That no more lands shall be certified or conveyed to any State or to any corporation or individual, for the benefit of either of the companies herein mentioned, where it shall appear to the Secretary of the Interior that such transfers may create an excess over the quantity of lands to which such State, corporation or individual would be rightfully entitled.

You will proceed at once, and with as much dispatch as possible, to adjust all land grants to aid in the construction of railroads, under the provisions of the act above referred to, and in accordance with the directions herein given. You will inform the Department at once when you commence the adjustment of any grant, in order that cases pending in the Department involving the rights of the road under such grant may be taken up and considered.

Govt. Exhibit "N"

B. DEPARTMENT OF THE INTERIOR,
MEL

General Land Office,

Washington, D. C.

May 19, 1914.

I hereby certify that the annexed copies of papers, are true and literal exemplifications from the original papers on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington,
 (SEAL) on the day and year above written.

C. M. BRUCE
 Assistant Commissioner of the
 General Land Office.

Filed in evidence

Mar 2 1915

LEROY B. GULOTTA, Clerk,
 U. S. District Court,
 West Dist. of Louisiana.

162

424623-77

No. 166

STATE OF LOUISIANA }
 PARISH OF ORLEANS }
 CITY OF NEW ORLEANS. }

KNOW ALL MEN BY THESE PRESENTS, that
 WHEREAS, the following-described lands, situated in
 the Parishes of Grant, Vernon, Natchitoches, DeSoto, Winn,
 Sabine, Calcasieu, St. Landry, Rapides and Catahoula, State
 of Louisiana, amounting in the aggregate to 5749.92 acres,
 were patented to the New Orleans Pacific Railway Company
 under the provisions of the Act of Congress approved March
 3, 1871, and the confirmatory act of February 8, 1887, re-
 spectively, to-wit:

* * * * *

HERE FOLLOWS DESCRIPTION OF LANDS,
 AGGREGATING 5749.92 ACRES. DESCRIPTION OMITTED AT REQUEST OF SOLICI-
 TORS FOR COMPLAINANT.

* * * * *

And WHEREAS, by the second section of the said Act
 of Congress of February 8, 1887, it was provided, that all
 lands that were occupied by actual settlers at the date of the

definite location of the road, and were still in their possession, or in the possession of their heirs or assigns, should be held and deemed excepted from the grant and subject to entry under the laws of the United States, which provision applied to patented as well as to unpatented lands, and to the indemnity, as well as to the primary limits of the grant.

And WHEREAS, by numerous decisions of the Land Department of the United States, the aforesaid lands were awarded to various settlers and demands have been made by the Commissioner of the General Land Office, upon the New Orleans Pacific Railway Company to reconvey the said lands to the United States for the benefit of such settlers in virtue of the provisions of said section 2 of the act of February 8, 1887,

163 And WHEREAS, by an order of the Honorable Don. A. Pardee Circuit Judge of the United States, for the Fifth Circuit, Eastern District of Louisiana, of date May 14th, 1900, Charles M. Greene, as Receiver of the Land Grant, and the New Orleans Pacific Railway Company, through Robert Strong, its Vice-President, and John T. Granger and George S. Clay, Trustees of the Land Grant Mortgages, were authorized and directed to reconvey to the United States, the said 5749.92 acres of land in order that the same might be restored to the public domain, and the claims of the settlers thereto allowed and confirmed.

NOW THEREFORE, in consideration of the premises, and in virtue of the aforesaid order of the United States Circuit Court, a certified copy of which is hereto attached and made part hereof, the New Orleans Pacific Railway Company, through Charles M. Greene, Receiver, of the Land Grant, does hereby assign, transfer, convey, remise and quit claim unto the United States, all of the hereinbefore described tracts of land.

And now intervene and appear herein under and by virtue of said order of court, of date May 14th, 1900, John T. Granger and George S. Clay, Trustees of the Land Grant Mortgage executed by the New Orleans Pacific Railway Company, of date April 17, 1883, and the supplemental mortgage by said company, executed of date January 5th, 1884,

in their capacity as mortgagees, only and for the sole purpose of releasing, remising, and quitclaiming unto the United States the property above described, and for the purpose of consenting that as to the lands herein conveyed, but only as to the same, the inscription of the said Land Grant Mortgage may be cancelled, which consent is hereby given.

Further came and appeared, and intervened in this act, Robert Strong, Vice President of the New Orleans Pacific Railway Company, acting under and in pursuance of the order of said court, of date May 14th, 1900, hereby releasing to the United States, all of the right, title and interest of the said New Orleans Pacific Railway Company in and to the property hereinbefore described.

164 IN WITNESS WHEREOF, the said Receiver of the Land Grant and said Vice-President of the New Orleans Pacific Railway Company have hereunto affixed their hands and signatures, and the same have been attested by the Secretary of the said New Orleans Pacific Railway Company, with the seal of the said Railway Company attached, on this, the eighth (8th) day of June, A. D. 1900.

CHAS. M. GREENE
Receiver.

ROBT. STRONG
Vice President, New Orleans
Pacific Railway Company.

ATTEST:

W. R. ELLIOTT
Secretary.

W. M. RHODES	}	Witnesses for Receiver and Vice- President.
GEO. F. BENSEL		Trustees of the Land Grant Mortgage of the New Orleans Pacific Railway Co., of April 17, 1883, and supple- mental mortgage of January 5, 1884.
JOHN T. GRANGER	}	W. N. JONES S. GRAHAM MULLEN
GEO. S. CLAY		Witnesses for Trustees,

165 STATE OF LOUISIANA, }
 PARISH OF ORLEANS. }

BE IT REMEMBERED, that on this the 8th day of June, A. D. 1900, personally appeared before me, the undersigned authority, CHARLES M. GREENE, Receiver of the Land Grant, and ROBERT STRONG, Vice President of the New Orleans Pacific Railway Company, to me well known as such, who acknowledged before me that they had signed the foregoing deed of conveyance, and had caused the seal of said Company to be affixed thereto for the consideration and purposes therein stated.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my seal of office, this, the 8th day of June, A. D. 1900.

Q. G. EUSTIS
Notary Public.

STATE OF NEW YORK, }
 CITY OF NEW YORK, }
 COUNTY OF NEW YORK. }

BE IT REMEMBERED, that on this the 18th day of June, A. D. 1900, personally appeared before me, the undersigned authority, John T. Granger and George S. Clay, Trustees of the Land Grant Mortgage executed by the New Orleans Pacific Railway Company, April 17, 1883, and the supplemental mortgage executed January 5th, 1884, to me well known to be the Trustees of said Mortgages, who acknowledged before me that they had signed the foregoing deed of conveyance for the consideration and purposes therein stated.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my seal of office, on this the 18th day of June, A. D. 1900.

WILL J. HARDWIN.

(SEAL)

COMMISSIONER OF DEEDS for the State of Louisiana, in and for the State of New York, resident in said State of New York.

166

Registered in Sales Book 1, page 40-41 Land Department, New Orleans Pacific Railway Company, New Orleans, La., June 8th, 1900.

CHAS. M. GREENE,
Receiver.

ENDORSED: No. 166-12

N. O. Pacific Ry. Co.

to

United States.

June 8th, 1900.

F. Aug. 22. 1900.

Noted on S. Bk. E. H. H.

1900—104935—3.

167

424623-89

UNITED STATES CIRCUIT COURT
EASTERN DISTRICT OF LOUISIANA.

#12,687.

JOHN T. GRANGER ET ALS, vs

NEW ORLEANS PACIFIC RAILWAY CO

} In Eq.
at N. O.

To the Honorable the Judges of the Court:

The petition of Charles M. Greene, Receiver in this cause, respectfully represents:

That among the lands of which the petitioner is Receiver under the orders of the Court, are certain lands in the Parishes of Grant, Vernon, Natchitoches, DeSoto, Winn, Sabine, Calcasieu, St. Landry, Rapides, Catahoula and St. Mary, which are fully described in the exhibits hereto annexed and herewith filed as part of this petition, and marked Exhibit "A" and Exhibit "B."

Exhibit "A" contains a list of lands concerning which the New Orleans Pacific Railway Company has been called

upon under the 2nd Section of the Act of Congress approved February 8th, 1887, to reconvey to the United States for the benefit of certain settlers whose claims and rights are reserved by the said Act of Congress. These lands are situated in the Parishes of Grant, Vernon, Natchitoches, DeSoto, Winn, Sabine, Calcasieu, St. Landry, Rapides and Catahoula, and amount to 5749.92 acres, of which the following is a summary:

Grant Parish,	665.78 acres,
Vernon Parish,	162.24
Natchitoches Parish	640.06
DeSoto Parish,	315.50
Winn Parish	121.77
Sabine Parish,	2421.24
Calcasieu Parish,	40.53
St. Landry Parish,	536.07
Rapides Parish,	526.68
Catahoula Parish,	320.05

5749.92 acres

as appears by said Exhibit "A".

168 The said Exhibit "B" contains a list of lands which have been erroneously patented to the New Orleans Pacific Railway Company, and which should be reconveyed to the United States, owing to sundry prior adverse claims. This list of lands is situated in the Parishes of Natchitoches, St. Landry, Sabine, and St. Mary, and amount in all to a total of 1421.10 acres, as by said Exhibit "B" will appear.

The petitioner represents that the claims of said settlers to the lands mentioned in Exhibit "A" have been contested by the New Orleans Pacific Railway Company in the Land Department of the United States, with due diligence, but the said claims have been finally allowed, and petitioner is advised and believes that it is impossible to make further defense of them, and that it is necessary and proper in the execution of his trust, and in the closing up of the affairs of

the Receivership, to make reconveyance of said lands, to the United States, in accordance with said Act of Congress of February 8th, 1887.

The Petitioner is also advised and believes that the lands mentioned in Exhibit "B" were erroneously patented to the New Orleans Pacific Railway Company, and ought also to be reconveyed to the United States, in order to prevent unnecessary litigation and expense.

Petitioner further shows that there are pending in the Circuit Court of the United States, two certain suits Nos. 12,494 and 12,495, entitled respectively, the United States against the Texas & Pacific Railway Company et als, in which the United States has filed its bills of complaint asking for a decree to compel the reconveyance of certain lands therein described under the provisions of said Act of February 8, 1887. Among the lands whose reconveyance is thus demanded, are 4447.32 acres situate in the Parishes of Grant, Vernon, Natchitoches, DeSoto, Winn, Sabine, Calcasieu, St. Landry, and Rapides, and a detailed list of said 4447.32 acres are included in the said exhibit "A" as lands to be reconveyed for the benefit of the said settlers under the said Act of February 8, 1887.

169 Now petitioner is advised and believes that it will save litigation and expense and will tend to the settlement and disposition of said Causes Nos. 12,494 and 12,495, to reconvey the lands mentioned in Exhibit "A", which include those mentioned in Exhibit "C" and that it is for the best interests of the said New Orleans Pacific Railway Company, and of the trust which is in charge of your petitioner and of all concerned, that such reconveyance should be made by your petitioner, and by the said Railway Company, of all the lands mentioned in said Exhibits "A" and "B" to the United States, and that the Trustees in this cause, John T. Granger and George S. Clay should be authorized and directed to join in said reconveyance to the end that the mortgages they represent should be released; such reconveyance to be made by a proper deed and to include all the lands mentioned in said Exhibits "A" and "B" and which

will include therefore those in the said two Chancery suits to the extent mentioned in Exhibit "C".

The premises considered, petitioner prays that proper orders of this Honorable Court may be made herein authorizing and directing your petitioner, as Receiver, its Vice President, and the said John T. Granger and George S. Clay, as Trustees of the Lard Grant Mortgages mentioned in this cause to join in and make a proper deed of reconveyance to the United States of said lands and for such other and further orders and decrees in the premises as may be just, equitable, and proper, in view of the foregoing facts.

(Signed) HOWE, SPENCER & COCKE
Solrs. for Petnr.

170 424623—93.

AFFIDAVIT.

UNITED STATES OF AMERICA. S.S.

Charles M. Greene, Receiver in this cause, being duly sworn, says, that the foregoing petition is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true, and that he is advised and believes that it is for the best interests of all parties concerned in this Receivership, that the order requested should be granted.

(Signed) CHAS. M. GREENE.

Sworn to and subscribed before me on this 12th day of May, A. D. 1900.

(Signed) J. C. EUSTIS,
(SEAL) Not. Pub.

171 424623-94

ORDER.

On consideration of the foregoing petition, and the documents and proceedings therein mentioned, and proceedings

heretofore had in this cause, it is ordered that the prayer of said petitioner be granted, and that Charles M. Greene, as Receiver, and the New Orleans Pacific Railway Company, through Robert Strong, its Vice President, and John T. Granger and George S. Clay, Trustees of the Land Grant, Mortgages set forth in this cause, be, and are hereby authorized and directed to reconvey to the United States by proper deed, the 5749.92 acres of land set forth and described in Exhibit "A" of the foregoing petition, and the 1421.10 acres mentioned and described in Exhibit "B" of the said petition, and that the Receiver make report of his action to the Court.

In open court this 14th day of May, 1900.

(Signed) DON A. PARDEE,
Circuit Judge.

172

EXHIBIT "A" DUPLICATE.

LIST OF LANDS TO BE RECONVEYED TO THE UNITED STATES BY THE NEW ORLEANS PACIFIC RAILWAY COMPANY, UNDER SECTION 2 OF THE ACT OF CONGRESS APPROVED FEBRUARY 8, 1887, FOR THE BENEFIT OF CERTAIN SETTLERS.

HERE FOLLOWS DESCRIPTION OF LANDS,
AGGREGATING 5749.92 ACRES.

DESCRIPTION OF LANDS OMITTED AT REQUEST OF SOLICITORS FOR COMPLAINANT.

EXHIBIT "A"

173

EXHIBIT "B"

LANDS ERRONEOUSLY PATENTED TO THE NEW ORLEANS PACIFIC RAILWAY COMPANY, TO BE RECONVEYED OWING TO PRIOR ADVERSE CLAIMS.

HERE FOLLOWS DESCRIPTION OF LANDS, AGGREGATING 1421.10 ACRES. DESCRIPTION OMITTED AT REQUEST OF SOLICITORS FOR COMPLAINANT, UNITED STATES OF AMERICA.

EXHIBIT "B"

174

EXHIBIT "C"

LANDS NOW IN SUIT OF UNITED STATES VS. NEW ORLEANS PACIFIC RAILWAY. Still the property of the Railway Company.

HERE FOLLOWS DESCRIPTION OF LANDS, AGGREGATING 4447.32 ACRES.

(Description omitted at request of Solicitors for Complainant).

EXHIBIT "C".

175 CLERK'S OFFICE:

I certify that the foregoing to be a true copy from the original record in this office.

WITNESS my hand and Seal of said Court at the City
of New Orleans, La., this 6th. day of June,
1900.

E. R. HUNT

Clerk.

by E. M. FULLER,

Deputy Clerk.

ENDORSED: No. 12,687

U. S. Circuit Court.

John T. Granger et al. vs New Orleans Pa-
cific Ry. Co.

Copy of Petition and Order.

1900—104935-1.

176

In the
District Court of the United States for
the Western District of Louisiana.

No. 947 In Equity.

UNITED STATES OF AMERICA,

vs.

N. O. PACIFIC RY. CO.

W. R. PICKERING LUMBER COMPANY,
and

SOUTHLAND LUMBER COMPANY.

This cause came on to be heard on the Bill of Complaint, answer and other pleas filed by the defendants, intervention of Stephen N. Grant, and pleas and answers to the said intervention, and upon an agreed statement of facts and other evidence adduced:

And it appearing to the court that this cause has been regularly filed, put at issue, taken up, tried, argued and submitted;

And it appearing that the law applicable hereto and

the evidence herein being in favor of the defendants, and against the plaintiff and intervenor;

WHEREFORE, the court is of the opinion and doth adjudge and decree as follows:

1st. That the demands of plaintiff be rejected at plaintiff's costs;

2nd. That the demands contained in the intervention of Stephen N. Grant be rejected at his costs;

3rd. That a decree be entered herein confirming the patent issued to the New Orleans Pacific Railway Company on the 3rd day of March, 1885, insofar as the said patent includes the South Half of the Northwest Quarter, and the North Half of the Southwest Quarter, Section 3, Township 3 North of Range 7 West, Louisiana Meridian, said patent being confirmed only insofar as it includes said land.

4th. That the W. R. Pickering Lumber Company be quieted in its ownership and possession of the Northeast Quarter of Southwest Quarter Section 3, Township 3 North of Range 7 West, and that its title thereto be and the same is hereby confirmed.

That the Southland Lumber Company be quieted in its ownership and possession of the South Half of Northwest Quarter, and Northwest Quarter of Southwest Quarter, of Section 3, Township 3 North of Range 7 West, and that its title thereto be and the same is hereby confirmed.

Thus done, read and signed in open court, this the 6th day of November, A. D. 1915.

ALECK BOARMAN
United States Judge.

ENDORSED: No. 947 In Equity. United States District Court, Western District of Louisiana. United States vs. W. R. Pickering Lumber Company and Southland Lumber Company. FINAL DECREE. Filed Nov. 6, 1915, Leroy B. Gulotta, Clerk, U. S. District Court, West Dist. of Louisiana. Recorded in Chancery Order Book, Vol. 4, Folio 294.

177 In the District Court of the United States
 for the Western District of Louisiana.

No. 947 In Equity.

UNITED STATES OF AMERICA,

vs.

NEW ORLEANS PACIFIC RAILWAY COMPANY,
SOUTHLAND LUMBER COMPANY,
and
W. R. PICKERING LUMBER COMPANY.

To the Honorable Aleck Boarman, Judge of the United
States District Court for the Western District of
Louisiana :—

The petition of the United States, through undersigned
counsel, and Stephen N. Grant, through his undersigned
solicitor, plaintiff and intervenor, respectively, in the above
numbered and entitled case, with respect represents :—

That plaintiff and intervenor conceive themselves aggrieved by the decree rendered and signed by your honor in said cause on the 6th day of November, 1915—and desire to appeal from said decree to the United States Circuit Court of Appeals for the 5th Circuit. Petitioners present herewith, and make a part hereof, an assignment of errors in said decree.

WHEREFORE, plaintiff and intervenor pray that this appeal may be allowed and that a transcript of the whole record, proceedings, testimony, exhibits, and papers upon which said decree was made, duly authenticated, be sent to the Circuit Court of Appeals for the 5th Circuit in the manner and form, and at the time prescribed by law and by the rules of the said Circuit Court of Appeals. Petitioners pray that citation of appeal issue and be served upon the said New Orleans Pacific Railway Company, the W. R. Pickering Lumber Company and the Southland Lumber Company according to law and in accordance with the rules of pro-

cedure in such cases. Petitioners further pray that pending said appeal all proceedings herein be stayed and that said appeal operate as a supersedeas. That the appeal herein prayed for by intervenor may be allowed and that same operate as a supersedeas upon the giving by intervenor of bond with surety in an amount to be fixed by the court and conditioned according to law. Petitioners pray

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Page 2.

for all orders necessary in the premises and for general relief.

GEO. WHITFIELD JACK
United States Attorney

ROBERT A. HUNTER
Assistant United States Attorney
Solicitors for Plaintiff.

DON E. SoRELLE
Solicitor for Intervenor.

ORDER.

The above and foregoing petition being considered, it is ordered that the appeal prayed for by the United States, plaintiff, herein to the United States Circuit Court of Appeals for the 5th Circuit be, and the same is hereby, granted and allowed.

It is further ordered that citation of appeal issue and be served upon the defendants New Orleans Pacific Railway Company, W. R. Pickering Lumber Company, and the Southland Lumber Company and that said appeal be made returnable to the United States Circuit Court of Appeals for the 5th Circuit at New Orleans, Louisiana, according to law, and in accordance with the rules of said court.

It is further ordered that pending said appeal all proceedings herein be suspended, said appeal to operate as a supersedeas.

It is further ordered that the appeal herein prayed for by Mr. Stephen N. Grant, intervenor, be allowed and that same operate likewise as a supersedeas, upon the giving by

intervenor of bond, with surety, in the sum of Fifty Dollars conditioned according to law.

Thus done and signed this 10th day of December, 1915.

ALECK BOARMAN
United States Judge.

Filed Dec. 10-1915, Leroy B. Gulotta, Clerk, U. S. District Court, West Dist. of Louisiana.

179 In the District Court of the United States
 For the Western District of Louisiana.

No. 947 In Equity

UNITED STATES OF AMERICA
versus
NEW ORLEANS PACIFIC RAILWAY COMPANY,
W. R. PICKERING LUMBER COMPANY,
and
SOUTHLAND LUMBER COMPANY.

KNOW ALL MEN BY THESE PRESENTS: That we, STEPHEN N. GRANT, as principal, a resident of the Parish of Vernon, State of Louisiana, and Jno. R. Bagents, Jr., a resident of the Parish of Vernon, State of Louisiana, as surety, are held and firmly bound unto the New Orleans Pacific Railway Company, the W. R. Pickering Lumber Company and the Southland Lumber Company, defendants and Appellees, in the sum of Fifty Dollars (\$50), lawful money of the United States, to be paid to them, and their respective executors, administrators, successors, or assigns, to which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and each of our heirs, executors and administrators, by these presents.

Signed and dated this the 2nd day of Dec. A. D. 1915.

WHEREAS, lately at a term of the District Court of the United States sitting in and for the Western District

of Louisiana, in a suit pending in said Court between the United States of America, as Plaintiff, and the New Orleans Pacific Railway Company, W. R. Pickering Lumber Company and Southland Lumber Company as Defendants, and Stephen N. Grant, Intervenor, No. 947 on the docket of said Court, in Equity, a decree was entered rejecting the demands and dismissing the intervention of the said Stephen N. Grant, Intervenor, and the said intervenor has been allowed an appeal to the United States Circuit Court of Appeals for the Fifth Circuit, to reverse the decree rendered in the above numbered and entitled cause:

NOW, THEREFORE, the condition of this obligation is such that if the above named Stephen N. Grant, Intervenor, shall prosecute his said appeal to effect, and answer all damages and costs if he fail to make his plea good,

then this obligation shall be void; otherwise to remain in full force and effect.

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STEPHEN N. GRANT.
JNO. R. BAGENTS, JR.

State of Louisiana,
Parish of Vernon.

On the 2nd day of Dec. 1915, personally appeared before me Stephen N. Grant and Jno. R. Bagents, Jr., personally known to me to be the persons described in and who executed the foregoing instrument as parties thereto, and respectively acknowledged, each for himself, that they executed the same as their free act and deed for the purpose therein set forth.

And the said Jno. R. Bagents, Jr., Surety, being by me duly sworn, says that he is a resident and householder of the Parish of Vernon, in the Western District of Louisiana, and that he is worth the sum of Fifty (\$50) Dollars over and above his just debts and legal liability and property exempt from execution.

STEPHEN N. GRANT.
JNO. R. BAGENTS, JR.

Subscribed and sworn to before me this the 2nd day
of Dec. 1915.

(Seal)

I. C. BOYD,
Notary Public.

Approved: This 10th day of December, 1915.

ALECK BOARMAN,
United States Judge.

ENDORSED: No. 947. United States District Court,
Western District of Louisiana. United States vs. New
Orleans Pacific Railway Co., W. R. Pickering Lumber
Company, and Southland Lumber Company. APPEAL
BOND OF INTERVENOR STEPHEN N. GRANT.
Filed Dec. 10-1915, Leroy B. Gulotta, Clerk, U. S. Dis-
trict Court, West Dist. of Louisiana.

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CITATION OF APPEAL.
(U. S. Circuit Court of Appeals)

The United States of America
District Court of the United States
Western District of Louisiana

The President of the United States of America to the New
Orleans Pacific Railway Company, W. R. Pickering
Lumber Company and the Southland Lumber
Company, defendants in the cause entitled United
States of America vs. New Orleans Pacific Railway
Company, W. R. Pickering Lumber Company and
Southland Lumber Company, No. 947, in Equity,
on the docket of the District Court of the United
States for the Western District of Louisiana,
Greeting:

You are hereby cited and admonished to be and appear
at the United States Circuit Court of Appeals for the Fifth
Circuit, to be holden the City of New Orleans, Louisiana, on
the thirtieth day from the date hereof, pursuant to an ap-
peal allowed and filed in the Office of the Clerk of the Dis-
trict Court of the United States for the Fifth Circuit and

the Western District of Louisiana, wherein United States of America and Stephen N. Grant are appellants and New Orleans Pacific Railway Company, W. R. Pickering Lumber Company, and Southland Lumber Company are appellees, to show cause, if any there be, why the judgment rendered against the said United States of America and Stephen N. Grant as in said decree mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States of America, at the City of Shreveport, Louisiana, this 10 day of December in the year of our Lord, one thousand nine hundred and fifteen and of the Independence of the United States of America, the one hundred and fortieth year.

ALECK BOARMAN

(Seal)

Judge.

182 Service of the within citation of appeal accepted and acknowledged, this the 10 day of December, 1915.

HUDSON, POTTS, BERNSTEIN & SHOLARS
Solicitors for New Orleans Pacific Railway Company,
Defendant and Appellee.

JAS. G. PALMER

Solicitors for W. R. Pickering Lumber Company,
Defendant and Appellee.

JAS R MONK.

Solicitors for Southland Lumber Company,
Defendant and Appellee.

U. S. District Court, Filed Dec 10 1915 Leroy B. Gulotta,
Clerk, West Dist. of Louisiana.

No. 947 United States District Court Western District of Louisiana United States of America vs. New Orleans Pacific Railway Co. Southland Lumber Company. and W. R. Pickering Lumber Company. CITATION OF APPEAL 2870 U. S. Circuit Court of Appeals Filed Dec 16 1915 Frank H. Mortimer Clerk.

183 In the District Court of the United States
 for the Western District of Louisiana

No. 947 in Equity.

UNITED STATES OF AMERICA,

versus

NEW ORLEANS PACIFIC RAILWAY COMPANY,

W. R. PICKERING LUMBER COMPANY,

and

SOUTHLAND LUMBER COMPANY.

Through their respective undersigned solicitors, now come the United States of America, plaintiff in the above numbered and entitled cause, and Stephen N. Grant, intervenor in said suit, and with respect show:

That in the decree herein made and entered on November 6, 1915, rejecting the demands of plaintiff and intervenor, confirming the patent issued to the New Orleans Pacific Railway Company in so far as it includes the land in controversy in this cause, and quieting the W. R. Pickering Lumber Company and Southland Lumber Company in the ownership and possession of and confirming the title to said land, there was manifest error.

That there was no written opinion filed in the case and no reasons assigned for the decree, other than those stated in the decree itself, but as stated by the Court the Judge found reason in his own judgment as to the law and the facts disclosed on the hearing to decide the case adversely to the complainant and intervenor.

In order that each of the contentions made respectively by the plaintiff and intervenor and by the defendants may be brought before the Court, the assignment of errors is framed just as though the lower court had specifically held against the plaintiff and intervenor on each of their contentions and had held in favor of defendants on each of their contentions. Thus, error is assigned as follows:

1.

That it was error for the court to hold that the United States through its officers, the Attorney General and the United States Attorney, did not have authority to bring, prosecute or maintain this suit, for the reason that the Attorney General did have such authority under the general laws of the United States, and it was specifically made his duty to file such suit by the second section of the Act of Congress approved March 3, 1887, (24 Statutes at Large, page 556).

2.

That it was error for the court to hold that there was laches on the part of plaintiff and intervenor in filing this suit, and that they were estopped to

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bring and maintain the same, for the reason that such defenses cannot be plead against the Government, and for the further reason that the United States filed suit February 27, 1901, in the Circuit Court of the United States for the Western District of Louisiana, entitled "United State vs. New Orleans Pacific Railway Company, et al., No. 16 in Equity," to cancel patent to the land herein involved, and other lands, on the same grounds alleged in this suit, which said suit is now pending; and for the further reason that Stephen N. Grant, the actual settler named in the bill of complaint and intervention, and Thomas J. Killen and Jack Conerly, likewise actual settlers (the said Stephen N. Grant being their successor and assignee), had open, notorious and uninterrupted possession of the land in question from 1876 to the date of the institution of this suit, which possession was notice to all of said settlers' rights.

3.

That it was error for the court to hold that this suit was barred and the titles of the defendants confirmed by the provisions and limitations contained in the Acts of Congress of March 3, 1887, (24 Statutes at Large, page 556), March 3, 1891, (26 Statutes at Large, page 1093), and

March 2, 1896, (29 Statutes at Large, page 42), which said statutes were plead in bar of this suit and as muniments of title by defendants, and it was likewise error for the court to sustain the pleas and defenses predicated on said acts, for the following reasons:

- (a) That defendants' titles were not confirmed by the Act of March 3, 1887, nor were plaintiff's or intervenor's rights in the premises adversely affected by said Act.
- (b) That the Acts of March 3, 1891, and March 2, 1896, were not applicable to a suit of this nature wherein the United States is seeking a decree cancelling the patent in so far as it includes the land described in the bill of complaint, which decree would result in the consummation of the homestead entry of, and the issuance of a patent to, the said Stephen N. Grant, who, by reason of the public land laws, and under the terms of the act of February 8, 1887, acquired vested rights in and to said premises before, and at the time of the definite location of said railroad, which vested rights continued to exist in full force to, and at the time of, the passage of the said acts, and which vested rights Congress did not intend to divest, modify, or affect, by said acts, and which vested rights could not lawfully be divested, affected, or modified thereby.

That, consequently, the court erred in sustaining the pleas and defences predicated on said acts, the said acts being intended to operate only against the Government when seeking the cancellation of patents for errors, fraud, or irregularities, which affect the title only as between the United States and the patentee, or holder under the patent, and not to prevent the cancellation of patents to lands which are not free from individual claims.

- (c) That the said act of March 2, 1896, is inapplicable to this suit because, as shown by the evidence, on February 25, 1901, before the period of limitation provided by said act had run, the United States filed suit in this court to cancel patents to a large number of tracts of land, including

the tract herein involved, alleged to have been erroneously issued, said suit being entitled United States vs. New Orleans Pacific Railway Company et als Number 16 on the docket of this court, which suit is now pending. That defendants Pickering Lumber Company and Southland Lumber Company were not made original parties defendant in said suit No. 16, and instead of amending the Bill in said suit to make said Pickering Lumber Company and the Southland Lumber Company parties defendant, this present suit was filed, which is but a continuation of said Suit No. 16 so far as these defendants and this particular tract of land are concerned.

4.

That it was error for the court to confirm the patents issued to the New Orleans Pacific Railway Company on the 3rd day of March, 1885, in so far as they included the land described in the bill of complaint in this suit, which said land, the evidence shows, was occupied by, and in the possession of Thomas J. Killen, an actual settler, at the time of the definite location of the line of road of the said New Orleans Pacific Railway Company, and still remained in his possession until the year 1886, at which time Stephen N. Grant became his assignee, and that said property remained in the possession of the said Grant an actual settler from the time of his acquisition of the rights and claims of the said Thomas J. Killen, in 1886, until and subsequent to the date of passage of the act of Congress of

February 8, 1887; the said Thomas J. Killen and the said Stephen N. Grant being qualified to enter said lands under the homestead laws, and having settled upon and occupied the same with that intention.

5.

That it was error for the court to hold that the W. R. Pickering Lumber Company and the Southland Lumber Company and their predecessors in title were bona fide purchasers of said lands and to decree the confirmation of the

titles, and to quiet defendants in their ownership and possession of same, for the reason that the defence of "bona fide purchaser" is an affirmative defence, the burden of proving which rests on defendants, and they failed to prove that they did not, at the time of their purchases, have knowledge of the possession and adverse claim of Stephen N. Grant and the adverse claim of intervenor. And for the further reason that such defence of bona fide purchaser, even if established, can be plead only as against the technical claim of the Government in a suit to cancel patent for its own benefit, and is not applicable in a suit of this character to cancel patents for the benefit of an actual settler having a prior right, or to a suit instituted by such settler to have the land decreed held in trust for him.

6.

That it was error for the court not to hold that the lands described in the bill of complaint were, as alleged in said bill, occupied by and in the possession of the said Thomas J. Killen, an actual settler, prior to, and at the time of, the definite location of the said New Orleans Pacific Railway Company's road on November 17, 1882, and remained in the possession of Stephen N. Grant, his assignee, at the time of the passage of the act of February 8, 1887, and remained continuously thereafter in the possession of the said Stephen N. Grant, intervenor, and that, therefore, the said lands were excepted from the grant of the New Orleans Pacific Railway Company, and their inclusion in the said patent was erroneous.

7.

That it was error for the court to hold that the

right of the said actual settler, Stephen N. Grant, to the premises described in the bill of complaint were affected by or lost to him, and that the right of the Government to the recovery in this action of a decree cancelling the patent herein was affected or lost on account of the fact that at the time of the definite location of said railroad the said Thomas J. Killen, actual settler, did not have

on file in the proper United States land office application to enter said land as a homestead, for the reason that the evidence shows that the said Thomas J. Killen was an actual settler on said lands at the date of the definite location of said railroad, and that the same still remained in his possession until the year 1886, when the said Stephen N. Grant became the assignee of all the rights, title, and claims of the said Thomas J. Killen, and that the said land still remained in the possession of the said Stephen N. Grant at the time of the passage of the act of February 8, 1887, under the terms of which act such lands were excepted from the grant.

8.

That it was error in the court not to hold that no title to the said land was acquired by the said New Orleans Pacific Railway Company by virtue of its grant, for the reason that the land described in the bill of complaint was occupied by an actual settler at the time of the filing of the map of definite location of the said defendant company's railroad on November, 17, 1882, and said actual settler Thomas J. Killen having theretofore settled upon said land and being qualified to enter same under the homestead laws of the United States, and intending so to do, which said property remained in the possession of the said actual settler until the year 1886 when Stephen N. Grant, an actual settler, became the assignee of all the right, title, interest, and claim of the said Thomas J. Killen, and said property remained in the possession of said Stephen N. Grant at the time of the passage of the act of February 8, 1887, and continuously since.

9.

It was error in the court not to hold that the

said Thomas J. Killen acquired a homestead right or claim to the land in question by reason of his settlement and occupancy of the same at and prior to the filing of the map of definite location by the New Orleans

Pacific Railway Company of its line of railroad, and that the said Stephen N. Grant became the successor and assignee of the said Thomas J. Killen's homestead right or claim by reason of such settlement and occupancy of the said Thomas J. Killen, who was qualified to enter such lands under the homestead laws and entitled so to do, by reason of such assignment and the settlement and occupancy of said lands by said Stephen N. Grant who was likewise qualified to enter said lands under the homestead laws and entitled so to do, and such lands were excepted from the railroad company's grant, and the said Stephen N. Grant acquired a homestead right or claim thereto.

10.

It was error in the court not to hold that the said lands were occupied by and in the possession of the said Thomas J. Killen prior to and at the time of the definite location of the said railroad, and have remained in his possession and in the possession of intervenor continuously since; that on or about February 20, 1891, Stephen N. Grant filed homestead application for said tract of land; that the New Orleans Pacific Railway Company made objection to, and contested, said application; that the Register and Receiver of the local Land Office rendered a decision in favor of the said Stephen N. Grant; that the railway company appealed from the said decision to the commissioner of the General Land Office; that the Commissioner of the General Land Office affirmed said decision in favor of the said settler holding that the said land was in the occupancy of the said Thomas J. Killen a bona fide settler at the time of the definite location of said railroad and was at the time of said contest and decision in the possession of the said Stephen N. Grant as the assignee of the said settler; that the claim of the said Stephen N. Grant was protected by the Second Section of the act of February 8, 1887; and that the land was erroneously patented to the railway company; that the Commissioner of the General Land Office rejected

the railway company's claim to said land, and
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made demand on said New Orleans Pacific Railway Company to reconvey same to the United States in order that the said Stephen N. Grant might consummate his claim by entry thereto; and that the said Stephen N. Grant complied with all of the requirements of the homestead laws of the United States, all of which facts are shown by the evidence in said cause.

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It was error in the court not to hold and find that the said New Orleans Pacific Railway Company did not acquire an indefeasible title to the land described in the bill of complaint under the provisions of the act of March 3, 1871. That under its general powers, Congress, on the failure of the New Orleans, Baton Rouge & Vicksburg Railway Company to complete its railroad within the time specified by the said act, had the right to impose conditions upon the enjoyment of the grant made to said railroad company by the act of March 3, 1871, as to lands previously patented or thereafter to be patented, and to reserve and except from said grant lands occupied by actual settlers at the time of the definite location of said road, and still remaining in their possession and in the possession of their heirs or assigns at the time of the passage of the act of February 8, 1887, and to provide for the protection of said settlers. That in any event such act, having been accepted by the New Orleans Pacific Railway Company, its conditions, reservations, and exceptions were binding upon said company and its assignees.

12.

It was error in the court not to hold that intervenor is, and always has been, ready and willing to pay to the defendant New Orleans Pacific Railway Company or to the other defendants such sum of money as was expended by them in securing from the United States patent to the land described in the bill of complaint.

13.

It was error in the court to render or enter its decree herein against plaintiff and intervenor rejecting their demands and confirming the said patent and quieting the Southland Lumber Company and the W. R. Pickering Lumber Company in the ownership and possession of said lands and confirming their title thereto.

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It was error in the court not to have entered a decree herein in favor of the plaintiff cancelling and declaring null and void the patent issued to the New Orleans Pacific Railway Company on the 3rd day of March 1885 in so far as the same includes the land described in the bill of complaint, and also cancelling the deeds of the W. R. Pickering Lumber Company and the Southland Lumber Company to said lands as prayed for in said bill of complaint.

15.

It was error in the court not to have entered a decree herein declaring the title of the W. R. Pickering Lumber Company and the Southland Lumber Company to be held in trust for the said Stephen N. Grant, his heirs or assigns, and to have declared him to be the owner of said land, and to have required and directed the said W. R. Pickering Lumber Company and the Southland Lumber Company to make, execute and deliver to the said Stephen N. Grant deeds for all of their right, title, and interest in and to said land, and, in default, or their failure to do so, that such deeds be made by the clerk or some other person duly appointed thereto, as prayed for in the petition of intervention in this case.

WHEREFORE, plaintiff and intervenor pray that this assignment of errors may be maintained, and that the decree appealed from be annulled, avoided, and reversed, and they respectfully pray that there be a decree in favor of

plaintiff and intervenor as prayed for in the bill of complaint and in the petition of intervention herein.

GEO. WHITFIELD JACK
United States Attorney.

ROBERT A HUNTER
Assistant United States Attorney.
Solicitors for Plaintiff.

DON E. SoRELLE
Solicitor for Intervenor.

191 The Court was not disposed to assign for its decree any specific reason, nor to make any specific finding of fact, in order that the whole case on all issues therein made, if desirable by both plaintiff and intervenors on the one part and by defendants on the other, might be presented and reviewed on appeal.

ALECK BOARMAN
United States Judge.

ENDORSED: No. 947 In Equity. United States District Court, Western District of Louisiana. United States vs New Orleans Pacific Railway Co., W. R. Pickering Lumber Company and Southland Lumber Company. PETITION AND ORDER OF APPEAL, and ASSIGNMENT OF ERRORS. Filed Dec. 10-1915, Leroy B. Gullotta, Clerk, U. S. District Court, West Dist. of Louisiana.

192 United States District Court,
Western District of Louisiana.

Monday, Shreveport, Louisiana,
March 8, A. D. 1915.

Court met pursuant to adjournment and was ordered opened.

Present and Presiding: Hon. Aleck Boarman, U. S. Judge.

Present: Robert A. Hunter, Ass't U. S. Attorney.

Present: U. S. Marshal: By J. M. Grimmet, Chief Deputy.

Present: Leroy B. Gulotta, Clerk.

No. 947 In Equity.

UNITED STATES

vs.

NEW ORLEANS PACIFIC RY. CO.

and

W. R. PICKERING LBR. CO.

In this cause now into Court come Messrs. Hudson, Potts, Bernstein & Sholars, and file their appearance as Solicitors for the New Orleans Pacific Railway Company.

IT IS ORDERED that court adjourn until 10 o'clock tomorrow morning.

193 United States District Court,
 Western District of Louisiana.

Saturday, Shreveport, La., November 6, 1915.

Court Met Pursuant to Adjournment and Was Ordered
Opened.

Present and Presiding: Hon. Aleck Boarman, U. S. Judge.

Present: G. W. Jack, Esq., United States Attorney.

Present: J. H. Kirkpatrick, United States Marshal.

Present: J. M. Grimmet, Chief Deputy U S Marshal.

Present: Leroy B. Gulotta, Clerk.

In Equity.
 No. 947
 United States of America,
 vs.
 N. O. Pacific Railway
 Company,
 W. R. Pickering Lumber
 Company,
 and
 Southland Lumber
 Company

This cause came on for trial. Mr. G. W. Jack, United States Attorney, appearing on behalf of the Complainant, and Mr. J. G. Palmer appearing on behalf of the Defendant, and the cause was regularly tried, argued and submitted, and decision rendered in favor of the defendant.

Thereupon, the following Decree is signed and filed:

FINAL DECREE.

This cause came on to be heard on the Bill of Complaint, answer and other pleas filed by the defendants, intervention of Stephen N. Grant, and pleas and answers to the said intervention, and upon an agreed statement of facts and other evidence adduced:

And it appearing to the Court that this cause has been regularly filed, put at issue, taken up, tried, argued and submitted;

And it appearing that the law applicable hereto and the evidence herein being in favor of the defendants, and against the plaintiff and intervenor;

Wherefore, the court is of the opinion and doth adjudge and decree as follows:

1st. That the demands of plaintiff be rejected at plaintiff's costs;

2nd. That the demands contained in the intervention of Stephen N. Grant be rejected at his costs;

3rd. That a decree be entered herein confirming the patent issued to the New Orleans Pacific Railway Company

on the 3rd day of March, 1885, insofar as the said patent includes the South Half of the Northwest Quarter, and the North Half of the Southwest Quarter, Section 3, Township 3, North of Range 7 West, Louisiana Meridian, said patent being confirmed only insofar as it includes said land.

4th. That the W. R. Pickering Lumber Company be quieted in its ownership and possession of the Northeast Quarter of Southwest Quarter Section 3, Township 3 North of Range 7 West, and that its title thereto be and the same is hereby confirmed.

That the Southland Lumber Company be quieted in its ownership and possession of the South Half of North West Quarter, and Northwest Quarter of South-west Quarter, of Section 3, Township 3 North of Range 7 West, and that its title thereto be and the same is hereby confirmed.

Thus done, read and signed in open court, this the 6th day of November, A. D. 1915.

ALECK BOARMAN
United States Judge.

IT IS ORDERED THAT COURT ADJOURN UNTIL
10 O'CLOCK MONDAY MORNING.

194 UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF LOUISIANA.

FRIDAY, SHREVEPORT, LA., DECEMBER 10th,
A. D. 1915.

COURT MET PURSUANT TO ADJOURNMENT AND
WAS ORDERED OPENED.

Present and Presiding: Hon. Aleck Boarman, U. S.
Judge.

Present: U. S. Marshal: By G. E. Geren, Deputy.

Present: Leroy B. Gulotta, Clerk.

UNITED STATES OF
AMERICA

vs.

No. 947 Equity.

NEW ORLEANS PA-
CIFIC RAILWAY CO.

SOUTHLAND LUMBER
COMPANY,

and

W. R. PICKERING LUM-
BER COMPANY.

In this case now comes the plaintiff, the United States, appearing by G. W. Jack, United States Attorney, and Robert A. Hunter, Assistant United States Attorney, and the Intervenor, Stephen N. Grant, through his Solicitor, Don E. SoRelle, Esq., and presents to the Court Assign-

ment of Errors, and Petition for Appeal, and thereupon the following Order is signed and filed granting said appeal to the United States Circuit Court of Appeals for the Fifth Circuit.

ORDER.

The above and foregoing petition being considered, it is ordered that the appeal prayed for by the United States, plaintiff herein, to the United States Circuit Court of Appeals for the Fifth Circuit, be, and the same is hereby granted and allowed.

It is further ordered that citation of appeal issue and be served upon the defendants New Orleans Pacific Railway Company, W. R. Pickering Lumber Company, and the Southland Lumber Company and that said appeal be made returnable to the United States Circuit Court of Appeals for the 5th Circuit at New Orleans, Louisiana, according to law, and in accordance with the rules of said court.

It is further ordered that pending said appeal all proceedings herein be suspended, said appeal to operate as a supersedeas.

It is further ordered that the appeal herein prayed for by Mr. Stephen N. Grant, intervenor, be allowed and that same operate likewise as a supersedeas, upon the giving by

intervenor of bond, with surety, in the sum of Fifty Dollars, conditioned according to law.

Thus done and signed this 10th day of December, 1915.

ALECK BOARMAN
United States Judge.

IT IS ORDERED THAT COURT ADJOURN UNTIL
10 O'CLOCK TOMORROW MORNING.

195 IN THE DISTRICT COURT OF THE
 UNITED STATES
FOR THE WESTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA
versus
NEW ORLEANS PACIFIC RAIL-
WAY COMPANY,
W. R. PICKERING LUMBER
COMPANY,
and
SOUTHLAND LUMBER COM-
PANY

} No. 947 in Equity.

Shreveport, Louisiana, December 10th-1915.

Clerk, United States District Court,
Western District of Louisiana,
Shreveport, Louisiana.

Dear Sir:

Please prepare transcript of appeal in the above case,
and copy therein the following pleadings, testimony, documents,
exhibits and proceedings:

1. Bill of complaint.
2. Answer of the New Orleans Pacific Railway Company, embodying pleas of prescription, estoppel, laches, and motion to dismiss.
3. Answer of W. R. Pickering Lumber Company, embodying pleas of prescription, estoppel, laches, and motion to dismiss.
4. Answer of the Southland Lumber Company, embodying pleas of prescription, estoppel, laches, and motion to dismiss.
5. Intervention of Stephen N. Grant.
6. Answer of New Orleans Pacific Railway Company, to intervention of Stephen N. Grant, embodying pleas of prescription, estoppel, laches, and motion to dismiss.
7. Answer of W. R. Pickering Lumber Company to intervention of Stephen N. Grant, embodying pleas of prescription, estoppel, laches, and motion to dismiss.
8. Answer of the Southland Lumber Company to intervention of Stephen N. Grant, embodying pleas of prescription, estoppel, laches, and motion to dismiss.
9. Answer of United States to intervention of Stephen N. Grant.
10. Statement of facts.

House Report No. 2698 (49th Congress, First Session) and Senate Report No. 711 (47th Congress, First Session), to be copied from printed report of the hearings before the Committee on Public Lands in the House of Representatives on H. R. 5890, dated January 26 and 27, 1914, pages 118, to 135, inclusive, omitting railroad company charters.

11. Testimony taken at the trial, including all objections to testimony and all offerings.
12. The following exhibits referred to in said testimony:
 - (a) Government's Exhibit A: Resolution adopted at a meeting of the stockholders of the New Orleans Pacific

Railway Company accepting the provisions of the Act of Congress of February 8, 1887, to be copied from the printed report of the hearings before the Committee on Public Lands of the House of Representatives on H. R. 5890, of date January 26 and 27, 1914, said resolution appearing on pages 28 and 29 of said report.

(b) Government's Exhibit B: Agreement of the New Orleans Pacific Railway Company to reconvey lands, dated August 3, 1892, to be copied from page 30 of printed report of said hearing above referred to.

(c) Government's Exhibit C: Copy of the Land Office Record relating to the homestead entry and contest between Stephen N. Grant and the New Orleans Pacific Railway Company.

Government's Exhibits D-1 to D-19, inclusive: Omit these exhibits, and in lieu thereof insert the following:

197 "These exhibits show that on February 27, 1901, the United States Government, acting through the Attorney General and the United States Attorney for the Western District of Louisiana, filed its bill in Equity, entitled: "United States of America vs. New Orleans Pacific Railway Company, et al." the same being No. 16 on the Equity docket of the United States then Circuit now District Court for the Western District of Louisiana.

"This bill was a suit by the Government against the New Orleans Pacific Railway Company, a Louisiana corporation, alleged to be within the jurisdiction of the Court, and the following non-residents of the State of Louisiana: John F. Dillon and Amos H. Calef, residents of New York City; George J. Gould, resident of New York and New Jersey, sued individually and as heir and executor of Jay Gould, deceased; Edwin Gould; Howard Gould and Frank Gould, residents of the City of New York, sued individually and as heirs of Jay Gould; Anna Gould, wife of Count Boni de Castelane, a resident of Parish; Daniel F. Marsh, a resident of the State of Connecticut; A. Baldwin, a resi-

dent of New Orleans; J. B. Watkins, a resident of Lawrence, Kansas; and the following, whose residences were unknown, Charles Paulet, John F. Eddy and William D. Dewing.

"In the bill, the Government prayed for a decree cancelling patents to some hundred and fifty tracts of land, including the land in controversy in the case at bar, alleging that said tracts were erroneously patented to the said railway company under its grant from the United States, on the ground that said lands were, at the time of the definite location of the railroad, and at the date of the passage of the Act of Congress confirming the grant—February 8, 1887—occupied by actual settlers named in the bill of complaint and for which reason it was claimed the said lands were excepted from the grant, and the patents therefor issued erroneously.

Attached to the said bill of complaint was an order of the Court dated February 25, 1901, directing that those of the defendants, naming them (omitting, however, the New Orleans Pacific Railway Company), who were non-residents of the Western District of Louisiana, be ordered to "appear, plead and answer or demur by the _____ Monday of _____ 1901; and that this order be served upon them personally wherever found". The blanks in this order, in which were to be inserted the day of the month and the name of the month on which the said defendants were commanded to appear and answer, were not filled in but were left blank, and such order did not include among such non-resident defendants, the New Orleans Pacific Railway Company, which, however, as a matter of fact, was domiciled in the City of New Orleans, without the Western District of Louisiana.

A subpoena in chancery in said suit No. 16 was issued on the 27th day of February, 1901, by the Clerk of the United States Circuit Court for the Western District of Louisiana, directed to the United States Marshal for the Eastern District of Louisiana, commanding him to summon various defendants, including: "the New Orleans Pacific Railway Company, New Orleans, La.; Robert Strong, General Agent,

New Orleans, La.; Charles M. Green, Receiver of the New Orleans Pacific Railway Company, New Orleans, La., to appear before the Honorable Judge of the Fifth Judicial Circuit of the United States of America at a Circuit Court to be holden at the City of Alexandria, La., on the first Monday of April, 1901". Robert Strong, General Agent, and Charles M. Green, stated in the subpoena to be officers and representatives of the New Orleans Pacific Railway Company, are not mentioned in the bill in Equity nor in the Order of the Court directing service above noted. The return on this subpoena shows personal service on Charles M. Green, Receiver, and service on Robert Strong, General Agent, "by handing the same to W. R. Elliott, Secretary of said Company, in person at the office of said Company",

on the 28th day of February, 1901.

198 On March 27, 1901, several defendants, including Charles M. Green, Receiver of the New Orleans Pacific Railway Company, and the New Orleans Pacific Railway Company filed in the United States District Court for the Western District of Louisiana in this cause a petition praying for limited appearance, upon which an order was entered by the Court allowing the same and authorizing them to make "a limited appearance in this cause for the purpose of contesting the legality and regularity of the process issued against them in the said cause, and the regularity and validity of the service thereof, which said appearance was duly made on the same date.

On the 25th day of May, 1903, the following entry was made on the minutes of the United States District Court for the Western District of Louisiana, Alexandria Division: "United States vs New Orleans Pacific Railway Company, No. 16. This cause came on at this time to be heard upon the motion of defendants to dismiss the suit for want of proper service, and after argument of counsel the Court ordered that supplemental process issue and be served upon the defendants, to-wit, an order of the Court conforming to the first order with change of date, directing them to appear". The New Orleans Pacific Railway Com-

pany was not named in this order, but Charles M. Green, Receiver, and Robert Strong, Vice-President, were served on June 29, 1903, with a copy of an order of Court in this cause ordering and commanding them to appear and answer by the first Monday of September, 1903, the said order reciting their non-residence from the jurisdiction of the Court, and commanding the service upon them wherever found.

On September 25, 1903, by leave of the Court obtained, various defendants, including the New Orleans Pacific Railway Company and Charles M. Green, Receiver, made a limited appearance in this cause for the purpose of contesting the legality and validity of the process served upon them, and for that purpose only, alleging themselves to be non-residents of the Western District of Louisiana, moved the Court to vacate, annul and set aside the process served upon them, on the ground that no valid order had ever been entered commanding them to appear and plead to said bill; that the only order ever entered and signed upon said bill was the original order of February 25, 1901, which left blank the day of the month and the name of the month upon which they were to appear and answer, and that what purported to be a copy of an order commanding them to appear and answer on the first Monday of September, 1903, was not in fact a valid order of this Court, for the reason that no such order had ever been entered and signed by the Court (what had actually been done was that the blank dates in the original order had been filled in and a copy thereof certified and served), and that such service was therefore illegal and void, and not such service as to compel defendants to appear and plead to said bill.

On May 23, 1904, the following minute was entered in the minutes of the United States Circuit Court for the Western District of Louisiana: "United States vs New Orleans Pacific Railway Company, No. 16. In this cause the Court sustained the motion to quash the service made upon the defendants, and ordered that the defendants named in the original order be cited to set forth therein to plead, answer or demur on the second Monday of September, 1904, at the City of Alexandria."

On May 25, 1904, an original order of Court was entered commanding the defendants named in the first order had upon this bill to appear and answer on the second Monday of September, 1904, in the City of Alexandria, in the Western District of Louisiana, and that this order be served upon said defendants wherever found; a copy of this order was served personally by the United States Marshal for the Eastern District of Louisiana on Robert Strong, Vice President of the New Orleans Pacific Railway Company on June 7th, 1904, and on Charles M. Green,
199 Receiver of the New Orleans Pacific Railway Company on June 20th, 1904.

On August 26th, 1904, various defendants, including the New Orleans Pacific Railway Company, through their solicitors, made appearance in this cause, and on the same date filed a general demurrer to the Government's bill.

On October 24, 1904, the New Orleans Pacific Railway Company filed an amended demurrer, by leave of the Court had, alleging as additional grounds for the dismissal of the suit, that the plaintiff was not entitled to maintain the action or have the relief prayed for, inasmuch as it appeared on the face of the record that the suit was not brought within five years from the passage of an act of Congress entitled: "An act to provide for the extension of time within which suits may be brought to vacate and annul patents and for other purposes", approved March 2, 1896 (29 Statutes at Large, c. 39, p. 42), which demurrers, together with similar demurrers filed by the other defendants, were by the Court on the 17th day of March, 1905, overruled, and the said defendants assigned to answer the bill on the 22nd day of May, 1905, at Alexandria, La.

Various answers and pleas were filed on behalf of the several defendants, and on May 22, 1905, the New Orleans Pacific Railway Company filed a plea to the whole bill, setting up, in bar of the Government's action, the act of Congress approved March 2, 1896, (29 Statutes at Large, 42), especially averring that the time provided in such statute,

within which the Government might bring a suit to cancel a patent to lands erroneously issued under any railroad grant had elapsed prior to the 25th day of May, 1904, not until which date, it was contended, was the Government's suit herein brought or this defendant served with valid legal process so as to interrupt the running of said prescription, and that prior to September, 1904, no appearances or pleadings had been made in the cause on behalf of this defendant, by which the said prescription might be interrupted or the Court acquire jurisdiction over this defendant.

On February 19, 1906, the Government, through the United States Attorney, filed a replication of the United States of America, complainant, to this plea of the New Orleans Pacific Railway Company, defendant, November 6, 1913, the United States Attorney filed a motion to strike out the plea of the New Orleans Pacific Railway Company filed on May 22, 1905, as above set forth, on the ground that the same was a mere repetition of the amended demurrer of said Company, which had been filed on October 24, 1904, and overruled by the Court.

On November 6, 1913, the said motion of the Government to strike out the plea of the New Orleans Pacific Railway Company was overruled by the Court and the said plea referred to the merits of the cause, with leave to incorporate the same in its answer, to be filed within forty days, within which time, to-wit, on December 16, 1913, the New Orleans Pacific Railway Company filed its answer.

200 13. Government's Exhibit E: Letter from H. L. Muldrow, Acting Secretary, dated June 6, 1887, to the Registers and Receivers. To be copied from 5th Land Decisions, page 686 et seq.

14. Government's Exhibit F: Letter from the Commissioner of the General Land Office dated February 13, 1889, to the Registers and Receivers of the General Land Office to be copied from the 8th Land Decisions, page 348.

15. Government's Exhibit G: Map made by James W. Neal and Elzie Stokes, showing improvements, culti-

vation, etc., of Stephen N. Grant, to be sent to the United States Circuit Court of Appeals in the original.

16. Government's Exhibit 8: Patent No. 2 of the United States to the New Orleans Pacific Railway Company, dated March 3, 1885, in so far as it relates to the land involved in this suit. The clerk of court to omit from the said patent the descriptions of the various lands embraced therein other than the land involved in this suit, which is included in the following description: "NORTH OF BASE LINE AND WEST OF LOUISIANA PRINCIPAL MERIDIAN, LOUISIANA. NATCHITOCHES DISTRICT—TWENTY MILE LIMITS. * * * TOWNSHIP THREE, RANGE SEVEN, * * * The South West Quarter and the North Half of Section Threec * * * "

17. Government's Exhibit I: Letter from Willis Drummond, Commissioner, to Register and Receiver, New Orleans, Louisiana, dated November 29, 1871.

18. Government's Exhibit J: Letter from Willis Drummond, Commissioner, to Register and Receiver, Natchitoches, Louisiana, dated November 29, 1871, attached to stipulation of facts and referred to in Admission No. 8 thereof.

19. Government's Exhibit K: Certified copy of selection list, together with affidavit and certificate of the Register and Receiver, referred to in Admission No. 17 of the stipulation of facts herein.

20. Government's Exhibit L: Certified copy of approval of selection list referred to in Admission No. 17 of the stipulation of facts herein, the clerk to omit the description of lands in said approval, and in place of said description to state "Here follows description of lands involved in this suit, and other lands," as per agreement set forth in Admission No. 17.

21. Government's Exhibit M: Letter of instructions of Secretary Lamar to Acting Commissioner Stockslager, of November 22, 1887, to be copied from 6th Land Deci-

sions, page 276, as per agreement of counsel set forth in Admission No. 23 of the stipulation of facts herein.

22. Government's Exhibit N: Certified copy of petition of the Receiver of the New Orleans Pacific Railway Company to the United States Circuit Court for the Western District of Louisiana for authority to reconvey certain lands to the United States, together with order thereon, exhibits attached, and deed of reconveyance, which said exhibit is referred to in Admission No. 24 of the stipulation of facts herein. Omit description of lands.

- 23. Decree of court.
- 24. Petition and order of appeal.
- 25. Appeal bond of Stephen N. Grant, Intervenor.
- 26. Citation of appeal.
- 201 27. Assignment of errors.
- 28. Minutes of court.
- 29. Praecept for transcript.
- 30. Certificate of Clerk.

GEO. WHITFIELD JACK

United States Attorney.

ROBERT A. HUNTER

Assistant United States Attorney.

Solicitors for Plaintiff.

HUDSON, POTTS, BERNSTEIN & SHOLARS.
Solicitors for New Orleans Pacific Railway Company.

J. G. PALMER.

Solicitors for W. R. Pickering Lumber Company.

MONK & O'NEAL.

Solicitors for Southland Lumber Company.

Solicitors for Defendants.

DON E. SoRELLE.

Solicitor for Intervenor Stephen N. Grant.

Filed Dec. 10-1915, Leroy B. Gulotta, Clerk, U. S. District Court, West Dist. of Louisiana.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA
United States District Court, Fifth Circuit,
Western District of Louisiana.

CLERK'S OFFICE:

I, Leroy B. Gulotta, Clerk of the United States District Court for the Western District of Louisiana, do hereby certify that the above and foregoing 201 pages contain and form a full, complete and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial, in the cause entitled—

UNITED STATES OF AMERICA
versus
NEW ORLEANS PACIFIC RAILWAY COMPANY,
W. R. PICKERING LUMBER COMPANY,
and
SOUTHLAND LUMBER COMPANY,

wherein STEPHEN N. GRANT is INTERVENOR, Number 947 In Equity on the docket of the United States District Court for the Western District of Louisiana, the said Transcript having been made in accordance with the Præcipe of Solicitors for the Appellants and Appellees, filed December 10th, 1915, in this Office, a copy of said Præcipe being included in the Transcript.

WITNESS MY HAND AND SEAL OF OFFICE, at the City of Shreveport, Louisiana, this 13- day of December, A. D. 1915.

(Seal)

LEROY B. GULOTTA
Clerk, United States District Court,
Western District of Louisiana.



266 That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument in part.

Extract from the minutes of March 30th, 1916.

THE UNITED STATES OF AMERICA AND STEPHEN N. GRANT <i>versus</i> NEW ORLEANS PACIFIC RAILWAY COMPANY, W. R. PICKERING Lumber Company, and Southland Lumber Company.	No. 2870.
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On this day this cause was called and, after argument by George Whitfield Jack, Esq., United States attorney, for appellants, and Mark Norris, Esq., for appellees, was continued until Friday, March 31st, 1916, at 10.30 o'clock a. m. for further argument.

Further argument and submission.

Extract from the minutes of March 31st. 1916.

THE UNITED STATES OF AMERICA AND STEPHEN N. GRANT <i>versus</i> NEW ORLEANS PACIFIC RAILWAY Co., W. R. PICKERING Lumber Company, and Southland Lumber Company.	No. 2870.
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This cause, as continued from yesterday, was this day resumed, and after argument by Mark Norris, Esq., James G. Palmer, Esq., and F. G. Hudson, jr., Esq., for appellees, and Robert A. Hunter, Esq., assistant United States attorney, for appellants, was submitted to the court.

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Opinion of the court.

Filed October 3d, 1916.

In the United States Circuit Court of Appeals, Fifth Circuit.

THE UNITED STATES OF AMERICA AND STEPHEN N. Grant, appellants, <i>vs.</i> NEW ORLEANS PACIFIC RAILWAY COMPANY, W. R. Pickering Lumber Company, and Southland Lumber Company, appellees.	Number 2870.
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Appeal from the District Court of the United States for the Western District of Louisiana.

Geo. Whitfield Jack, U. S. attorney; Robert A. Hunter, assistant U. S. attorney, for United States; Don A. Sorelle, for intervenor.

H. H. White, James G. Palmer, F. G. Hudson, jr.; and Mark Norris for appellees.

Before Pardee and Walker, circuit judges, and Maxey, district judge.

Walker, circuit judge: This case in its pleadings and evidence and in the decree rendered is very similar to the case of United States, Newton B. Terrell, and Elijah W. Terrell v. New Orleans Pacific Railway Company and Gulf Lumber Company. (Ms., present term, U. S. C. C. A., 5th Circuit.) It is unlike that case in that the intervenor in this case, Stephen N. Grant, who commenced to live on part of the land in question in 1886, following a verbal purchase from one Killen, who had lived on the land since 1880, of the latter's

"improvements and claim," continued to live there up to the time of the filing of the bill, was qualified to make a homestead entry, and has not homesteaded other land. For support of the part of the decree appealed from which denied relief to the Government it is enough to refer to the ruling made in the case above cited.

As to the part of the decree which rejected the demand of the intervenor and quieted the W. P. Pickering Lumber Company and the Southland Lumber Company in the ownership of the parts of the 160 acres in question claimed by those companies respectively the following facts disclosed by the record are deemed to have some pertinency: By three deeds made and duly recorded in 1886, 1888, and 1889, respectively, the patentee sold and conveyed different parcels, together embracing the 160 acres in question, to three individuals, through whom, by mesne conveyances, all duly recorded, the title conferred by the patent was acquired by the two lumber companies mentioned by warranty deeds made in 1902 and 1903, respectively, each of which companies paid at the time of its purchase a fair price for the land so conveyed to it. Since the date of the patent, March 3, 1885, the successive holders of the record title to the land in question have had it regularly assessed to them and have regularly paid the taxes due thereon up to the present time. From 1880 to 1885, inclusive, Killen had assessed to him the improvements on the land and paid taxes thereon for those years. From 1890 to 1914, inclusive, the intervenor had the improvements assessed to him and paid taxes thereon for those years. According to his own statement his intention relative to the land when he moved on it following his purchase from Killen was to make it his home and to acquire it under the homestead law if he could. There is nothing in the record to indicate that at any time prior to the filing of this intervening petition he claimed to be the owner of the land. In the latter part of 1890, more than five years after the issue of the patent, and after the patentee had sold and conveyed its interest, he filed in the local land office an application to enter the land under the homestead law. After that ineffective proceeding ended he took no further action indicative of the assertion of any claim

beyond merely continuing to live on the land until he filed his intervening petition in this case. A tract of something over thirty acres, some of it land not embraced in the 160 acres in question, has been cleared for many years. The improvements, consisting of a "common rough house" of six rooms and some outhouses, are located on this clearing. On another part of the 160 acres a tract of about two acres was cleared and enclosed within a year or two before this suit was brought. Within a year after the intervenor moved on the land following his purchase from Killen he, as stated by himself in his testimony, learned that it was "claimed as railroad land." The claim that the railroad company and the other successive holders of the record title held that title, not as the beneficial owner of the land, but in trust for the intervenor, was, so far as anything in the record discloses, made by him for the first time when he filed his intervening petition in this case. There is no suggestion in the pleadings in the case that the right to the land of the holders of the record title had been lost by another's adverse possession of it for the time required to effect that result.

The intervenor can not sustain a complaint against the decree appealed from on the ground that the evidence showed that he had acquired a right to the land by an adverse possession of it. Mere occupancy of land, if unaccompanied by any claim of ownership, no matter how long continued, does not confer title. (*Sharon v. Tucker*, 144 U. S., 533; *Jasperson v. Scharnikow*, 150 Fed., 571; 15 L. R. A. (N. S.), 1178, and note; 2 *Corpus Juris*, 125.) Certainly the intervenor's conduct was not such as to notify parties seeking information upon the subject that he held the land or any part of it adversely and not in subordination to any title or claim of another. His effort to acquire the land under the homestead law,

though made in a tribunal the jurisdiction of which over the
270 land was terminated by the issue of the patent before that
tribunal was resorted to, was a distinct admission that he was
not the owner. It was not made to appear that his intention with
reference to the land underwent a change after that abortive pro-
ceeding ended. In the absence of other evidence of a change of the
intervenor's possession, the fact that there was no change is per-
suasively indicated by his continuing to return and pay taxes on
improvements only, and also by the circumstance that he is now in
court praying that, by a cancellation of the attacked patent, he be
afforded the opportunity to acquire ownership of the land under
the homestead law. The evidence leaves it in doubt whether either
of the successive holders of the record title was aware that anyone
was living on the land. If the facts as they existed at the time of
and shortly prior to the purchases of the two defendant lumber
companies were known to the representatives of those companies
they were such as were calculated to lead one contemplating a pur-
chase from the holders of the record title to the conclusion that the
intervenor's occupancy of a part of the tract in the midst of the

woods which covered the remainder of it was that of a more intruder who set up no claim of ownership and whose conduct indicated an abandonment of the only claim he had ever made of a right to acquire ownership, which many years before he had ineffectively asserted in a tribunal which was without jurisdiction to enforce the claim if it ever was a valid one. We conclude that it satisfactorily appears from the evidence that the intervener did not hold the land in question or any part of it adversely under a claim of ownership for the period requisite to confer title, and further, that his conduct was such as was calculated to lead one in the position of the defendant lumber companies, prior to their purchases, to the conclusion

that his occupancy of a part of the land was of a kind
271 that prevented its being an obstacle to the acquisition of ownership of the entire tract by a conveyance from the holder of the record title.

We come now to a consideration of the claim that in equity the intervener was entitled to the beneficial ownership of the land and that this right of his is still enforceable by a decree adjudging that those having the record title hold in trust for his use and benefit. The theory of this claim is that, at the time of the issue of the patent, the intervener had acquired such a right to the land that the title which passed from the Government by the issue of the patent enured in equity to his benefit and was there enforceable against the patentee and any subsequent holder of such title not protected as a bona fide purchaser for value without notice of the equity or by an estoppel effective against the claimant of the equity. The claim does not imply that the ownership of the holder of the legal title is or has been assailable at law. (Silver v. Ladd, 7 Wall. 219, 228; Burke v. Southern Pacific R. R. Co., 234 U. S. 669, 675; Svor v. Morris, 227 U. S. 524.) It is not cognizable elsewhere than in a court of equity and is subject to the equitable defenses of staleness or laches. The claimant's lack of due diligence in asserting the claim against a holder of the legal title who does not acquiesce in its validity renders it unenforceable in equity. In the case of such an implied or constructive trust unless there has been a fraudulent concealment of the cause of action lapse of time is as complete a bar in equity as at law and, independently of any statute of limitations, a court of equity declines to assist one who asserts such a claim if has slept upon his rights and shows no excuse for his laches in asserting them. (Speidel v. Henrici, 120 U. S., 377.) Assuming that the circumstances attending the acquisition of the legal title by the patentee were such as to give rise to a trust in favor of the intervener, the

resulting right of action accrued not later than April, 1887,
272 when the patentee accepted the provisions of the act of Congress of February 8, 1887. Before the date of such acceptance the patentee had already sold part of the land in dispute and, as it may be inferred, had appropriated the proceeds of the sale to its own use. The rest of the land was similarly disposed of by the

patentee before the end of 1889. The subsequent successive holders of the title conferred by the patent in like manner openly dealt with the land as their own, obviously not admitting that the intervener had any beneficial interest in it or in the proceeds of the successive sales of it. Within a very short time after the trust, if it ever existed, became enforceable, the intervener learned of the facts which he now claims gave him an equitable right of action and the conduct of the holder of the record title, not concealed, but contemporaneously disclosed by public records, evidenced a distinct repudiation of the alleged trust relation, which entitled the intervener to immediate relief and opened the door to the defense of laches. (*Patterson v. Hewitt*, 195 U. S. 309.) The intervener took no action then to make known or enforce the claim now asserted and allowed more than a quarter of a century to elapse before he presented the claim in a court of equity. During all that time the land, except the two cleared tracts above referred to, remained uninclosed and covered with virgin timber; all of it was openly dealt with as their own by the successive holders of the legal title and, though the intervener lived on and used a small part of it, the circumstances attending his connection with the land continued to be such as to negative a conclusion that he was setting up a claim that he had acquired the beneficial ownership of the whole or any part of it. We think nothing more than a statement of these facts is required to support the conclusion reached, that the evidence conclusively shows that the intervener was guilty of such inexcusable laches as to make now unenforceable the equitable claim which he asserts, however well founded that claim once may have been.

273 It follows from the conclusions above stated that neither of the appellants has a tenable ground of complaint against the decree appealed from. That decree is affirmed.

Maxey, district judge, was prevented by illness from participating in the decision of this case.

(Original filed October 3d, 1916.)

Judgment.

Extract from the minutes of October 3d, 1916.

THE UNITED STATES OF AMERICA AND STEPHEN N. GRANT, <i>versus</i> NEW ORLEANS PACIFIC RAILWAY COMPANY, W. R. Pickering Lumber Company, and Southland Lumber Company.	No. 2870.
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This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Louisiana, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said district court in this cause be, and the same is hereby, affirmed.

274 Petition for rehearing. Filed October 23d, 1916.

In the United States Circuit Court of Appeals, Fifth Circuit.

THE UNITED STATES OF AMERICA AND STEPHEN N. GRANT,
appellants,

vs.

NEW ORLEANS PACIFIC RAILWAY COMPANY, W. R.
Pickering Lumber Company, and Southland Lumber
Company, appellees.

No. 2870.

Appeal from the District Court of the United States for the Western
District of Louisiana.

Petition for rehearing.

Now come the United States and intervenor, appellants, in the
above numbered and entitled suit, and petition the court to set aside
the decree herein rendered, affirming the decree of the lower
275 court, and to grant a rehearing, or at least an argument for
same, on the following grounds, to wit:

1. It is respectfully represented that this court erred in sustaining
the plea of the statute of limitations, inasmuch as such statute has
no application in suits by the Government to cancel patents erroneously
issued in order that a settler having a prior right may
perfect his homestead. That the statute only applies to suits to
cancel patents where the Government alone is interested and the
land involved is public land within the statutory sense. That it
applies only "when there are no adverse individual rights, and only
the claims of the Government and of the present holder of the
title are to be considered." (United States vs. Winona, etc., Railroad
Company, 165 U. S., 463.)

That the court erred in holding that the lands involved in this
suit at the time of the issuance of the patent to the railway company
were public lands within the statutory sense, which is contrary
to the doctrine laid down in Osborne vs. Froysethe, 216 U. S.,
571, not referred to in the opinion, wherein it was held that if, at
the time of the selection by the railway company "the land was
actually occupied by one qualified under the law, who had entered
and settled thereon before that time, with the intent to claim
it as a homestead, the land had ceased to be public land, and as such
subject to selection as lieu land."

And, again, the court in applying the statute of March 2, 1896,
failed to give effect to the doctrine as stated in Winona and St.
Peters Railroad Company vs. United States, 165 U. S., 483, wherein
276 the court passing on the defense of bona fide purchaser, plead
under the same act, held that "the statute was not intended
to cut off the rights of parties continuing after the certifica-

and of which at the time of his purchase the purchaser had
waived." (Brief on Law, 147-140.)

2. A rehearing is further asked on the ground that the court erred in rejecting the prayer of the intervenor on the ground that he was guilty of laches. That the court in so doing erred in failing to follow the line of decisions holding that equitable estoppel based on laches can not be imputed to one in possession. (See Brief on Law, 105.) Further, the court in holding the intervenor guilty of laches, has overlooked the fact that he did all that was required of him under the adjustment act of March 3, 1887, promptly filed his contest against the New Orleans Pacific Railway Company, which contest was decided in his favor, and thereupon the Attorney General was requested by the Secretary of the Interior to enter suit for cancellation of the patent in order that he might perfect his homestead. That such suit was in fact filed in 1901 against the New Orleans Pacific Railway Company and various parties claiming by purchase from it, being suit 16, United States vs. New Orleans Pacific Railway Company et als., now pending in the Western District of Louisiana, to cancel patents to some one hundred and fifty odd tracts of land, including that claimed by intervenor. (See Record p. 257.) That as a matter of convenience, the record claimants of title under the New Orleans Pacific Railway Company not having been made parties defendant to said suit, instead of amending suit 16 and making them parties, the Government recently filed the present suit and several others as test cases to determine the issues involved. Thus the settler having done all the law required of him, and the Government having filed suit to cancel the railway company's patent in order that he might perfect his claims and receive patent to the lands herein involved, the settler in possession and undisturbed had a right to rely on the Government and await the termination of the suit filed by it, and laches can in no manner be imputed to him for not bringing suit against the record claimants to have patent decreed held in trust for him.

(Signed) **GEORGE WHITFIELD JACK,**
United States Attorney.

(Signed) **ROBERT A. HUNTER,**
Assistant United States Attorney.

(Signed) **DON E. SORELLE,**
Solicitor for Intervenor,
Solicitors for Appellants.

I certify that in my opinion the foregoing application for rehearing is well founded.

(Signed) **GEORGE WHITFIELD JACK,**
United States Attorney.

Shreveport, La., October 20, 1916.

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Order denying rehearing.

Extract from the minutes of November 4th, 1916.

**THE UNITED STATES OF AMERICA AND STEPHEN N. GRANT
*versus***

**NEW ORLEANS PACIFIC RAILWAY COMPANY, W. R. PICK-
ering Lumber Company, and Southland Lumber
Company.**

No. 2870.

Ordered that the petition for rehearing filed in this cause be and the same is hereby denied.

Petition for appeal and order allowing same. Filed March 14th,
1917.

In the United States Circuit Court of Appeals, Fifth Circuit.

**THE UNITED STATES OF AMERICA AND STEPHEN N.
Grant, appellants.**

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**NEW ORLEANS PACIFIC RAILWAY COMPANY, W. R.
Pickering Lumber Company, and Southland
Lumber Company, appellees.**

No. 2870.

Petition for appeal.

To the honorable judges of the United States Circuit Court of Appeals, Fifth Circuit:

Now come the United States and Stephen N. Grant, appellants in the above numbered and entitled cause, and say that on the third day of October, 1916, this court entered a decree herein in favor of the defendants and against this plaintiff and intervenor, in which decree there was error greatly to the prejudice and injury of the plaintiff and intervenor as will more fully appear by the assignment of errors, which is filed herewith.

Wherefore, the United States and Stephen N. Grant pray that an appeal may be allowed in said cause from this court to the Supreme Court of the United States, and that proper orders for the allowance of such appeal be made by this court.

(Signed) GEO. WHITFIELD JACK,

United States Attorney.

ROBERT A. HUNTER.

*William H. Henkin,
Assistant United States Attorney.*

DON E. SORELLE,

Attorney for Stephen N. Grant.

Order.

The foregoing petition for an appeal in the above numbered and entitled cause (with assignment of errors attached) to the Supreme Court of the United States, being considered—

It is ordered that such an appeal be granted and allowed the United States as prayed for, and that appeal be granted and allowed Stephen N. Grant on his giving bond in the sum of twenty-five dollars, conditioned according to law.

Thus done and signed this 14th day of March, 1917.

(Signed) DON A. PARDEE,
Judge United States Circuit Court of Appeals,
Fifth Circuit.

Assignment of errors. Filed March 14th, 1917.

Now come the United States of America and Stephen N. Grant, plaintiff and intervenor, respectively, herein, and appellants, and in connection with their petition for an appeal herein, present this, their assignment of errors, and say that the decree entered herein on the 3rd day of October, 1916, is erroneous in the following particulars, to wit:

I.

The court erred in holding that plaintiff's right of action
 280 in this cause was barred by the Statute of Limitations pro-
 vided by the act of March 2, 1896. .

II.

The court erred in holding that lands occupied by actual settlers under the provisions of the act of Congress approved February 8th, 1887 (24 Statutes at Large, 391-392), were not thereby divested of the status of public lands subject to entry by any one qualified under the public land laws of the United States and that the fact of occupation of such lands under the terms and provisions of said statute did not give to the settler the right of one who had made formal entry of such lands.

III.

The court erred in not holding that the lands herein involved under the terms of the original grant of March 3rd, 1871, and the confirmatory act of February 8th, 1887, were excepted from the grant by reason of the settler's occupancy on the dates named in the acts and in failing to cancel the patent in so far as it covered said lands.

IV.

The court erred in holding that the United States had no interest to assert the alternative prayer in the bill of complaint in which it was prayed that the patent be decreed held in trust for the settler, his heirs, and assigns.

V.

The court erred in holding that the Commissioner of the General Land Office and the Secretary of the Interior had no jurisdiction to determine the controversy between the settler and the patentee growing out of the application made by the settler to enter said lands.

VI.

The court erred in not holding that the patent and the title to the land were held in trust by the defendants for the intervenor.

VII.

281 The court erred in holding that the claim of the intervenor had been lost through laches, abandonment, and estoppel.

VIII.

The court erred in affirming the decree of the District Court.

Wherefore, plaintiff and intervenor pray that the decree herein complained of be reversed and corrected and that they may have an adjudication and decree in their favor as prayed for in the bill of complaint and petition of intervention in this cause.

(Signed) **GEORGE WHITFIELD JACK,**
United States Attorney.

(Signed) **ROBERT A. HUNTER,**
Assistant United States Attorney.

(Signed) **DON E. SORELLE,**
Attorney for Stephen N. Grant.

Bond on appeal. Filed March 14th, 1917.

In the United States Circuit Court of Appeals, Fifth Circuit.

THE UNITED STATES OF AMERICA AND STEPHEN N. GRANT,
appellants,

vs.

NEW ORLEANS PACIFIC RAILWAY COMPANY, W. R. PICK-
ering Lumber Company, and Southland Lumber Com-
pany, appellees.

No. 2870.

Know all men by these presents that we, Stephen N. Grant, appearing herein and represented by his solicitor, Don E. Sorelle, the said solicitor being a resident of the parish of Sabine, State of Louisiana, and Wm. Lyles, as surety, a resident of the parish of Vernon, State of Louisiana, are held and firmly bound unto the New Orleans Pacific Railway Company, the W. R. Pickering Lumber Company, and the Southland Lumber Company, defendants and appellees, in the sum of twenty-five (\$25.00) dollars, 282 lawful money of the United States, to be paid to them, and their respective executors, administrators, successors, and assigns, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, and administrators by these presents.

Signed and dated this the 5th day of March, A. D. 1917.

Whereas, lately at a term of the United States Circuit Court of Appeals of the Fifth Circuit, in a suit pending in said court between the United States of America, as plaintiff, and the New Orleans Pacific Railway Company, W. R. Pickering Lumber Company, and the Southland Lumber Company, as defendants, and Stephen N. Grant as intervenor, No. 2870 on the docket of said court, in equity, a decree was entered affirming the decree of the United States District Court for the Western District of Louisiana, in which the demands and intervention of the said Stephen N. Grant, intervenor, were rejected, and the said intervenor has been allowed an appeal, without supersedeas, to the Supreme Court of the United States, to reverse the decree rendered in the above numbered and entitled cause.

Now, therefore, the condition of this obligation is such that if the above-named Stephen N. Grant, intervenor, shall prosecute his said appeal to effect, and answer all costs if he fail to make his plea good, then this obligation shall be void; otherwise to remain in full force and effect.

STEPHEN N. GRANT,
Intervenor.
DON E. SORELLE,
Solicitor for Intervenor.
WM. LYLES, Surety.
Surety.

STATE OF LOUISIANA,
Parish of Sabine.

Personally appeared before me, Don E. Sorelle and Wm. Lyles,
personally known to me to be the persons described in and who
executed the foregoing instrument as parties thereto, and re-
spectively acknowledged, each for himself, that he executed
the same as his free act and deed for the purpose therein
stated.

And the said Wm. Lyles, surety, being by me first duly sworn, says that he is a resident and householder of the parish of Vernon, in the Western District of Louisiana, and that he is worth the sum of twenty-five (\$25.00) dollars, over and above his just debts and legal liability and property exempt from execution.

(Signed) DON E. SORELLE.
(Signed) WM. LYLES.

Subscribed and sworn to before me this 5th day of March, 1917.
[SEAL.] (Signed) W. R. ROBINSON,
Dy. Clerk & Ex Officio Notary Public.

Approved: This 14th day of March, 1917.

(Signed) DON A. PARDEE,
Judge, United States Circuit Court of Appeals, Fifth Circuit.

- 284 Opinion of the court. Filed October 3d, 1916, in case of
 United States, Newton B. Terrell et al. vs. New Orleans
 Pacific Ry. Co. et al., No. 2871.

In the United States Circuit Court of Appeals, Fifth Circuit.

THE UNITED STATES OF AMERICA, NEWTON B. TERRELL,
 and Elijah W. Terrell, appellants, No. 2871.
 vs.
 NEW ORLEANS PACIFIC RAILWAY COMPANY AND GULF
 Lumber Company, appellees.

Appeal from the District Court of the United States for the Western
 District of Louisiana.

On the 3rd day of March, 1885, a patent of the United States, which included a specified 160 acres of land in Vernon Parish, Louisiana, was issued to the New Orleans Pacific Railway Company, which was the assignee of a land grant made by an act of Congress of March 3, 1871, to the New Orleans, Baton Rouge & Vicksburg Railroad Company. (16 Stat. L. 573.) On January 10, 1890, the patentee conveyed the land mentioned to Jabez B. Watkins and the interest of the latter by mesne conveyances has passed to the Gulf Lumber Company, a corporation, to which a deed was made on April 10, 1907, by the Wright-Blodgett Company, then the holder of the claim under the patent. The bill in this case, filed January 21, 1915, in the name of the United States against the New Orleans Pacific Railway Company and the Gulf Lumber Company, averred that prior to and at the time of the filing of the maps showing the definite location of the road of the New Orleans Pacific Railway Company and at the time of the passage of the act of Congress of February 8, 1887, entitled "An act to declare a forfeiture of lands granted to the New Orleans, Baton Rouge and Vicksburg Railroad

Company to confirm title to certain lands and for other purposes" (24 Stat. L. 391), (the provisions of which act, it was averred, were accepted, as provided for in the act, by the New Orleans Pacific Railway Company on April 20, 1887), the land in question was occupied by and in possession of Wiley Terrell, who was then and there an actual settler and in all respects qualified to enter public lands of the United States under the homestead laws thereof; that the Gulf Lumber Company had full knowledge and notice of the rights and occupancy of the said actual settler and that because of quoted provisions contained in the last-mentioned act of Congress the inclusion of the 160 acres mentioned in the patent of March 3, 1885, was erroneous. The bill prayed in the alternative (1) that the patent and the deed to the Gulf Lumber Company be cancelled and declared null and void or (2) that the title held by the Gulf Lumber Company be decreed to be held by it in trust for the said Wiley Terrell or his heirs or assigns and to be conveyed to said

Wiley Terrell, his heirs or assigns. Each of the defendants filed an answer in which, besides other matters set up as defenses, it was duly pleaded that the claim asserted by the bill was barred by the statute of limitations of March 2, 1896 (29 Stat. L. 42; 3 U. S. Comp. St., 1913, §4901), and by laches and equitable estopped. Elijah W. Terrell and Newton B. Terrell filed separate interventions in the suit, each of them claiming that at the time the bill was filed he was in possession of part of the 160 acres described in the patent, was qualified to acquire it by homestead entry and was entitled to do so as the assignee of one to whom, as the result of successive transfers, the rights of Wiley Terrell had passed. By the decree which is appealed from the bill and the intervening petitions were dismissed, the assailed patent was confirmed as to the 160 acres in question and the Gulf Lumber Company was quieted in its possession and ownership thereof.

286 Geo. Whitfield Jack, U. S. attorney, Robert A. Hunter, asst. U. S. attorney, and J. H. Stephens, jr., for appellants.
Mark Norris, W. H. Thompson, and Blanchard, Smith & Palmer, for appellee, the Gulf Lumber Company.

Before Pardee and Walker, circuit judges, and Maxey, district judge.

Walker, circuit judge (after stating the facts as above): For support of the claims asserted by the bill and by the intervening petitions much reliance is placed upon provisions contained in the above-mentioned act of Congress of February 8, 1887, which was enacted, and the provisions of which were formally accepted by the patentee, after the date of the issue of the attacked patent, but before the patentee made the conveyance to Jabez B. Watkins, through whom the appellee Gulf Lumber Company claims title. The tract in question was embraced in the grant and confirmation to the New Orleans Pacific Railroad Company made by section 2 of that act unless it was excepted by the proviso to that section, "that all said lands occupied by actual settlers at the date of the definite location of said road and still remaining in their possession or in possession of their heirs or assigns shall be held and deemed excepted from said grant and shall be subject to entry under the public land laws of the United States." It is contended by the counsel for the appellants that that proviso and the provision of section 6 of the same act making it applicable to lands excepted from the grant and confirmation which had already been patented before the act was passed had the effect of giving to land occupied by an actual settler at the date of the definite location of the road, and remaining in his possession or in the possession of his heirs or assigns at the time of the passage of the

act, but which had been previously patented and the title to
287 which was held by the patentee at the time it accepted the provisions of the act, the status of erroneously patented lands, which the patentee was obligated to relinquish or reconvey to the United States upon the demand of the Secretary of the Interior, and

the patent to which was subject to be cancelled in a suit brought for that purpose by the Attorney General pursuant to the authority and command of section 2 of the act of March 3, 1887, entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes." (24 Stat. L. 556; 2 U. S. Comp. St., 1913, §4896.) These contentions are combatted by counsel for the appellees upon grounds not now necessary to be stated or considered. It is not material to determine whether the patent was or was not subject to cancellation, if, because of a duly pleaded bar caused by lapse of time or otherwise, that relief, though the plaintiff formerly was entitled to it, is not grantable in this suit, which was brought nearly thirty years after the patent was issued.

The right to a cancellation of the patent is barred by the act of March 2, 1896 (29 Stat. L. 42; 2 U. S. Comp. St., 1913, §4901), unless there is something in the case to make that statute inapplicable to it. That act provides "that suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this act"—that is to say, from March 2, 1896. The statute is applicable to a patent to public land of the United States which was open to sale and conveyance through the land department, though the patent was subject to be declared void on the ground that the land patented was reserved or excluded from the grant under which the patent was erroneously issued; and the lapse of the prescribed time before the institution of the suit to vacate and annul the

patent gives to the patent the same effect against the United States that it would have had if it had been valid in the first place. (United States v. Chandler-Dunbar Company, 209 U. S. 447; United States v. Winona, etc., Railroad, 165 U. S. 463.) But it is insisted that the above-quoted proviso to section 2 of the act of February 8, 1887, had the effect of preventing the land in question, occupied as it was at the date of the definite location of the road and when the act was passed, being considered public land subject to sale and conveyance through the land department. To yield to this insistence, we think, would be going in the teeth of the express words of the proviso declaring that lands so occupied "shall be subject to entry under the public land laws of the United States." The proviso had the effect of excluding lands so occupied from the grant and confirmation made by the preceding part of the section, and it may be inferred that the purpose of such exclusion was to afford to the occupants of the lands the opportunity of acquiring them under the public-land laws, if they possessed the qualifications and took the steps requisite to entitle them to do so; but nothing in the proviso indicates a purpose to give it the effect of a grant to the occupants, their heirs or assigns, of the lands so occupied, and its explicit language forbids the conclusion that land so occupied or settled upon was thereby deprived of the status of public land subject to entry under the public land laws of the United States, or that the mere fact of

occupation gave to the occupant the right of one who had effectively entered the land, rather than of making it merely subject to entry. (See Oregon & Cal. R. R. v. United States, 238 U. S. 393, 434.) In this connection the decision in the case of Northern Pacific Railway Co. v. United States, 227 U. S. 355, was called to our attention. There is an obvious distinction between the facts of that case and those of

the case at bar. It was held in that case that the limitation
289 which the statute created did not apply to a suit for the can-

cancellation of a patent to land which at and prior to the date of the issue of the patent belonged, not to the United States as a part of its public domain, but to the Yakima Indians, being part of a reservation made by a treaty with them which was ratified many years before the patent issued. Land to which a tribe of Indians has a perfected right does not belong to the same category as land which by statute is explicitly declared to be "subject to entry under the public land laws of the United States." We are of opinion that at the time of the issue of the patent the land in question was public land of the United States which was open to sale and conveyance through the land department.

Another contention is that the fact that the sought-for remedy of a cancellation of the patent was intended to enure to the benefit not of the United States but of an occupant of the land in question or his heirs or assigns renders the statute inapplicable to this suit. Nothing in the language of the statute gives any color to the claim that any suit brought by the United States to vacate and annul any patent to public land erroneously issued prior to the enactment under a railroad or wagon road grant was intended to be exempt from the bar which the statute created. It is apparent that the enactment evidences a purpose to restrict a vast power theretofore judicially recognized and decided to have been confided to the Attorney General, respects to which had not been infrequent, and to control it by a statute of limitations having the effect of avoiding some of the evils that might be expected to result from an abuse of the power by a postponement of its exercise until by a lapse of time those claiming under a patent might be deprived of the means, perhaps available at an earlier date, of combating a charge that it was procured by fraud or

was erroneously issued. (United States v. San Jacinto Tin
290 Co., 125 U. S., 273.) There had been notable instances of the exercise of this power by the Attorney General for the exclusive benefit of private parties asserting prior claims to the land involved, which the Government was under some duty to protect. (United States v. Beebe, 127 U. S., 338; United States v. Missouri, K. & T. R. Co., 141 U. S., 358; Germania Iron Co. v. United States, 165 U. S., 379; United States v. Winona, etc., Railroad, 165 U. S., 403.) It may be supposed that such instances, as well as those in which the power had been invoked to protect some public interest or title, had effect in bringing the lawmakers to a realization of the propriety of restricting the power by an explicit statute of limitations, applicable specifically to a suit by the United States to va-

cate and annul a land patent, whether the suit is or is not one which, because the only interest or right sought to be protected is that of a private party, some other bar or defense available against such party could successfully be set up. At any rate we are of opinion that the broad general language of the statute forbids the conclusion that it is inapplicable to such a suit as the one under consideration.

The claims asserted by the bill and by the intervening petitions that the land in question was held by the patentee and those claiming under it subject to a trust in favor of Wiley Terrell, his heirs or assigns, involve the recognition of the patent as valid and that it effected an extinguishment of the title and interest of the Government in the land. If a trust in favor of an occupant of the land arose because of the circumstances attending the acquisition of the patent, the resulting cause of action accrued not to the Government but to the cestui que trust. The exercise of no governmental power was required to secure an enforcement of such a trust. The contro-

versy to which the assertion of such a claim gives rise is one
291 in which the Government is not concerned, and in which pri-
vate parties alone are interested, and the settlement of it prop-
erly may be left to personal litigation between them. (*United
States v. Beebe*, 127 U. S., 338; *Northern Pacific Railway v. Trodick*,
221 U. S., 208.) The conclusion is that the Government has nothing
to complain of in the decree appealed from, as each of the remedies
its bill prayed for in the alternative was properly denied, any right
it may have had to one of those remedies being barred by the limita-
tion pleaded, and the other, assuming that it was not also subject to
the same bar, being one to which the Government was not entitled
because of its lack of interest in the claim asserted.

What has been said disposes of the attack upon the decree except as to that part of it which adjudged against the claims asserted by the intervening petitions and quieted the Gulf Lumber Company in its ownership and possession of the lands involved in the suit. That part of the decree might properly be the subject of complaint by the interveners if the effect of it was to deprive them of an interest in the land to which the evidence showed that they were entitled.

The evidence tended to prove that Wiley Terrell lived on the land in question continuously from 1879 until long after the passage of the act of February 8, 1887. If the patentee held the title to that land subject to a trust in favor of Wiley Terrell that trust became enforceable by the latter certainly not later than April 20, 1887, the date of the acceptance by the patentee of the provisions of the act just mentioned. He did nothing evidencing the assertion of such a claim, but on October 14, 1887, more than two years after the patent to the land had issued, he applied in the local land office to make a homestead entry of the land. That proceeding was pending several years. Its pendency before a tribunal the jurisdiction of which over the land had terminated by the issue of the patent before the pro-
ceeding was instituted (*Bicknell v. Comstock*, 113 U. S. 149;
292 *Germania Iron Company v. United States*, 165 U. S. 379) was

without effect upon the title which the patent passed, but was evidence of the fact that whatever possession Wiley Terrell had was not under a claim of ownership, but only under a claim of a prior right to acquire ownership from the United States. In 1899 he made a homestead entry on a different 160 acres, a patent to which was issued to him. In 1902 or 1903 he made a verbal sale (what the sale was intended to embrace, whether all or a part of the land or only improvements on it does not clearly appear) to one McCullough, who before he made this purchase had homesteaded 160 acres of land elsewhere and obtained a patent therefor. The sale to McCullough was followed by his going on the land and occupying some of it (the extent of the occupation was not clearly shown) in person or by tenants until 1909, when he sold his improvements to one Merchant, who never lived on the land and who sold to one O'Neill, through transfers from whom one of the interveners acquired possession of part of the land and the other acquired possession of another part of it. They also claim under a quit-claim deed made by their father, Wiley Terrell, after his transfer to McCullough and while the latter was in possession. During all this time the land was unenclosed, most of it being covered by virgin forest and having not more than two small clearings on it, and was assessed for taxation to the successive holders of the record title, who paid taxes on it and manifested their claim of ownership by such acts as might be expected of the owner of land mostly covered by virgin timber. It was not made to appear that either of the successive occupants asserted a claim different from the one asserted by Wiley Terrell.

The foregoing recital discloses several obstacles in the way of the maintenance of the claims asserted by and in behalf of the interveners. If the land in the hands of the patentee or its assigns was chargeable with a trust in favor of Wiley Terrell by reason of 293 the fact that he, being an actual settler, had a right, made by statute superior to any possessed by the patentee, to acquire the land from the Government, that trust became enforceable not later than April 20, 1887. It seems that the claim, if it was not otherwise extinguished, must have become stale or rendered unenforceable by laches as a result of the unexplained delay of more than a quarter of a century in asserting it against the holder of the record title; and that in favor of the present holder of that title which, presumably influenced by the apparent abandonment of the trust claim evidenced by the nonassertion of it during the immediately preceding twenty years, acquired that title in April, 1907, by paying a valuable consideration therefor, there is an estoppel on the interveners now to assert their claim. (*Osborne v. Altschul*, 101 Fed. 739; *Holt v. Murphy*, 207 U. S. 407.) But if at any time Wiley Terrell was entitled to acquire the land in question by a homestead entry he relinquished that right in 1899 by homesteading other land. After he took that step he was without color of right to challenge the action

in the United States Circuit Court of Appeals. Please also embody in said transcript the opinion of the United States Circuit Court of Appeals in the cause entitled United States of America, Newton B. Terrell, and Elijah W. Terrell vs. New Orleans Pacific Railway Company and Gulf Lumber Company, No. 2871 on the docket of said court.

Thus done and signed this 16th day of March, 1917.

(Signed) **GEO. WHITFIELD JACK,**
United States Attorney.
ROBERT A. HUNTER,
Assistant United States Attorney.
(Signed) DON E. SORELLE,
Solicitor for Intervenor.
F. G. HUDSON, Jr.,
Solicitor for New Orleans Pacific Ry. Co.
JAS. G. PALMER,
Solicitor for W. R. Pickering Lbr. Co.
JAS. G. PALMER,
Solicitor for Southland Lumber Co.

Clerk's certificate.

**United States of America. United States Circuit Court of Appeals,
Fifth Circuit.**

I, Frank H. Mortimer, clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that *that* pages numbered from 266 to 296 next preceding this certificate contain full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said court, numbered 2870, wherein the United States of America and Stephen N. Grant are appellants, and New Orleans Pacific Railway Company, W. R. Pickering Lumber Company, and Southland Lumber Company are appellees; and also of the opinion of said court in the cause entitled The United States of America, Newton B. Terrell, and Elijah W. Terrell, appellants, vs. New Orleans Pacific Railway Company and Gulf Lumber Company, appellees, No. 2871 of the docket of said court, copied as directed in the praecipe for transcript; as full, true, and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 265 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the city of New Orleans, Louisiana, in the Fifth Circuit, this 28d day of March, A. D. 1917.

[SEAL.]

FRANK H. MORTIMER,

Clerk of the United States Circuit Court of Appeals.

298 THE UNITED STATES OF AMERICA,

The President of the United States to New Orleans Pacific Railway Company, W. R. Pickering Lumber Company, and Southland Lumber Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a petition and order of appeal sued out and filed in the clerk's office of the United States Circuit Court of Appeals for the Fifth Circuit, in the cause wherein the United States of America and Stephen N. Grant are appellants, and you are appellees, to show cause, if any there be, why the decree rendered against the said United States of America and Stephen N. Grant and in said petition and order of appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States, this 14th day of March in the year of our Lord one thousand nine hundred and seventeen.

DON A. PARDEE,
United States Circuit Judge.

299 Service of the within citation of appeal is hereby acknowledged and accepted this 16th day of March, 1917.

F. G. HUDSON,
Solicitors for New Orleans Pacific Ry. Co.
JAS. G. PALMER,
Solicitor for W. R. Pickering Lumber Company.
JAS. G. PALMER,
Solicitor for Southland Lumber Company.

(Indorsed:) No. 2870. United States Circuit Court of Appeals, Fifth Circuit. The United States of America, and Stephen N. Grant, appellants, vs. New Orleans Pacific Railway Company, W. R. Pickering Lumber Company and Southland Lumber Company, appellees. Citation. U. S. Circuit Court of Appeals. Filed Mar. 22, 1917. Frank H. Mortimer, clerk.

(Indorsement on cover:) File No. 25884. U. S. Circuit Court of Appeals, 5th Circuit. Term No. 465. The United States of America and Stephen N. Grant, appellants, vs. New Orleans Pacific Railway Company, W. R. Pickering Lumber Company and Southland Lumber Company. Filed April 4th, 1917. File No. 25884.



In the Supreme Court of the United States.

OCTOBER TERM, 1917.

THE UNITED STATES OF AMERICA AND Mrs. Josephine Brown, appellants, <i>v.</i> NEW ORLEANS PACIFIC RAILWAY COM- pany, W. R. Pickering Lumber Com- pany, and River Land & Lumber Company.	No. 463.
THE UNITED STATES OF AMERICA AND William R. Turner, appellants, <i>v.</i> NEW ORLEANS PACIFIC RAILWAY COM- pany and W. R. Pickering Lumber Company.	No. 464.
THE UNITED STATES OF AMERICA AND Stephen N. Grant, appellants, <i>v.</i> NEW ORLEANS PACIFIC RAILWAY COM- pany, W. R. Pickering Lumber Com- pany, and Southland Lumber Com- pany.	No. 465.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE FIFTH CIRCUIT.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and respectfully moves the court to advance the above-entitled causes for joint hearing on a day convenient to the court during the next term.

These are suits by the United States filed in the District Court of the United States for the Western District of Louisiana against the New Orleans Pacific Railway Company and others claiming by conveyances from it to cancel certain patents alleged to have been erroneously issued to that company under a land grant made to the New Orleans, Baton Rouge and Vicksburg Railroad Company by the act of March 3, 1871 (16 Stat. 573).

The ground of the bills was that sections 2 and 6 of the act of February 8, 1887 (24 Stat. 391), confirming title in the New Orleans Pacific Railway Company to the grant and which was duly accepted by it, had the effect of excepting from the grant certain of the lands occupied by "actual settlers" who had made entries pursuant to the public land laws prior to the definite location of the railway in accordance with the provisions of the grant and to which settlers patents had also issued; and also had the effect of giving to the land so occupied by the settlers at the time of the definite location of the railway the status of erroneously patented lands which the railway company and those claiming by conveyances from it were obligated to relinquish and reconvey to the United States upon the demand of the

Secretary of the Interior, and the patents to which in the railway company were subject to be canceled in a suit brought by the United States for that purpose under section 2 of the act of March 3, 1887 (24 Stat. 556).

The settlers or those occupying the lands under conveyances from them intervened.

The demands of the United States were rejected by the District Court and decrees were entered confirming the patents to the railway company and quieting ownership to the lands involved in those who claimed by conveyances from it. The decrees were affirmed by the Circuit Court of Appeals for the Fifth Circuit, that court holding *inter alia* that as to the United States the suits were barred by the limitations contained in the act of March 2, 1896 (29 Stat. 42), and as to the intervenors their claims were barred by laches.

The cases are of importance to the Interior Department and the Department of Justice in the administration and enforcement of the particular statutes involved and the decision of this court will determine the disposition of many similar suits and claims of settlers now pending.

Notice of this motion has been served on opposing counsel.

JOHN W. DAVIS,

Solicitor General.

MARCH, 1918.



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In the Supreme Court of the United States.

OCTOBER TERM, 1918.

THE UNITED STATES OF AMERICA and MRS.)
JOSEPHINE BROWN, Appellants,
v.
NEW ORLEANS PACIFIC RAILWAY COMPANY, | No. 164.
W. R. PICKERING LUMBER COMPANY, and
RIVER LAND & LUMBER COMPANY.

THE UNITED STATES OF AMERICA and WIL-)
LIAM R. TURNER, Appellants,
v.
NEW ORLEANS PACIFIC RAILWAY COMPANY | No. 165.
and W. R. PICKERING LUMBER COMPANY.

THE UNITED STATES OF AMERICA and)
STEPHEN N. GRANT, Appellants,
v.
NEW ORLEANS PACIFIC RAILWAY COMPANY, | No. 166.
W. R. PICKERING LUMBER COMPANY, and
SOUTHLAND LUMBER COMPANY.

*APPEALS FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE FIFTH CIRCUIT.*

BRIEF FOR THE UNITED STATES.

INTRODUCTORY.

Each of these cases involves the title to a quarter section of land in Louisiana. The lands are included

in patents issued to the New Orleans Pacific Railway Company as assignee under the Act of February 8, 1887, 24 Stat. 391, of a railroad land grant made to the New Orleans, Baton Rouge and Vicksburg Railroad Company by the Act of March 3, 1871, 16 Stat. 573.

The patents were issued in 1885 and 1889, and the lands in question, after conveyance of them by the Railway Company, passed through mesne conveyances to various Lumber Companies who are parties defendant.

The bills were filed in the Western District of Louisiana January 21, 1915, in the name of the United States, to enforce the rights of certain named settlers on the lands under the Act of 1887, and to that end prayed for cancellation of the patents to the Railway Company and the deeds to the Lumber Companies so far as they include the lands in question, or, if that could not be done, that the Lumber Companies be adjudged to hold the title in trust for the respective claimants, and for general relief. The claimants intervened and prayed for similar relief.

The grounds of suit and intervention are: that the lands were excepted from the grant by reason of settlements made by the claimants before definite location of the railroad and continuous possession thereafter; that the rights of the claimants to the lands have been determined by decision of the Land Department to whose jurisdiction those rights were committed by the Act of 1887; and that the apparent titles acquired from the

Railway Company were taken with full notice of the rights of the claimants.

The Railway Company and the Lumber Companies in their answers make defense that the Government has no capacity to sue; that the suits are barred by limitation and laches; that the purchasers from the Railway Company took title in good faith without notice of any rights of settlers; and that the lands were not excepted from the grant because the alleged settlement rights never did attach, or, if they did attach, they were abandoned.

The District Court dismissed the bills, confirmed the patents, and quieted the title of the Lumber Companies, without opinion, but stated in a memorandum (Case No. 166, R. 250):

The court was not disposed to assign for its decree any specific reason, nor to make any specific finding of fact, in order that the whole case on all issues therein made, if desirable by both plaintiff and intervenors on the one part and by defendants on the other, might be presented and reviewed on appeal.

The Court of Appeals affirmed the decrees on the grounds that, as to the Government, the suits were barred by the Limitation Act of March 2, 1896, 29 Stat. 42, and as to the claimants they were barred by laches. No question relating to the merits of the suits, if seasonably brought, was considered. Opinions in No. 166, R. 268, 278; 235 Fed. 833, 841.

The Government and the intervenors thereupon appealed to this court.

General statement for all the cases.

The material facts are similar in all the cases and are not disputed. (For convenience references will be made only to the Record in No. 166. The peculiar facts of each case will be separately stated at the end of this general statement.)

By the Act of March 3, 1871, 16 Stat. 573, to aid in the construction of a railroad in Louisiana, the New Orleans, Baton Rouge and Vicksburg Railroad Company, a corporation of Louisiana, was granted ten alternate odd-numbered sections of public lands within twenty miles on each side of the railroad line "where the same shall not have been sold, reserved or otherwise disposed of by the United States and to which a preemption or homestead claim may not have attached at the time the line of said road is definitely fixed;" with the usual provisions for indemnity selections in lieu of excepted lands within ten miles beyond the granted limits; for the issuance of patents to lands earned by construction of each twenty consecutive miles of railroad; for withdrawal of the granted lands from other disposition upon filing a map of general route in the Interior Department; and specifically providing: "That said company shall complete the whole of said road within five years from the passage of this Act." §§ 22, 9, 12. The pertinent provisions are quoted in the margin.¹

¹ SEC. 22. That the New Orleans, Baton Rouge, and Vicksburg Railroad Company, chartered by the State of Louisiana, shall have the right to connect by the most eligible route to be selected by said company with the said Texas Pacific railroad at its eastern terminus, and shall have the right of way through the public land to the same extend granted hereby to the said Texas Pacific Railroad Company; and in aid of its construction from New Orleans to Baton Rouge, thence by the way of Alexandria, in said State, to connect with the said Texas Pacific Railroad Company at its

November 11, 1871, the grantee company filed its map of general route in the Interior Department;

eastern terminus, there is hereby granted to said company, its successors and assigns, the same number of alternate sections of public lands per mile, in the State of Louisiana, as are by this act granted in the State of California, to said Texas Pacific Railroad Company; and said lands shall be withdrawn from market, selected, and patents issued therefor, and opened for settlement and preemption, upon the same terms and in the same manner and time as is provided for and required from said Texas Pacific Railroad Company, within said State of California: *Provided*, That said company shall complete the whole of said road within five years from the passage of this act.

Sec. 9. That for the purpose of aiding in the construction of the railroad and telegraph line herein provided for, there is hereby granted to the said Texas Pacific Railroad Company, its successors and assigns, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as such line may be adopted by said company through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad in California, where the same shall not have been sold, reserved, or otherwise disposed of by the United States, and to which a preemption or homestead claim may not have attached at the time the line of said road is definitely fixed. In case any of said lands shall have been sold, reserved, occupied, or preempted, or otherwise disposed of, other lands shall be selected in lieu thereof by said company, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections first above named, and not including the reserved numbers. * * *

Sec. 12. That whenever the said company shall complete the first and each succeeding section of twenty consecutive miles of said railroad and put it in running order as a first-class road in all its appointments, it shall be the duty of the Secretary of the Interior to cause patents to be issued conveying to said company the number of sections of land opposite to and coterminous with said completed road to which it shall be entitled for each section so completed. Said company, within two years after the passage of this act, shall designate the general route of its said road, as near as may be, and shall file a map of the same in the Department of the Interior; and when the map is so filed, the Secretary of the Interior, immediately thereafter, shall cause the lands within forty miles on each side of said designated route within the Territories, and twenty miles within the State of California, to be withdrawn from preemption, private entry, and sale: *Provided, however*, That the provisions of the act of September, eighteen hundred and forty-one, granting preemption rights, and the acts amendatory thereof, and of the act entitled, "An Act to secure homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, and the amendments thereto, shall be, and the same are hereby, extended to all other lands of the United States, on the line of said road when surveyed, except those hereby granted to said company.

November 29, 1871, the Secretary of the Interior withdrew from disposition both the place and indemnity lands; and August 15, 1887, the indemnity withdrawal was revoked. Admission No. 8, R. 78-79, 203-205.

March 3, 1876, the five-year period for completion of the road expired without anything having been done to earn the grant. Admission No. 9, R. 79, 89-90; *New Orleans Pac. Ry. Co. v. Elliott*, 13 L. D. 157, 159; *New Orleans Pac. Ry. Co. v. United States*, 124 U. S. 124, 127.

January 5, 1881, pursuant to a resolution of its board of directors adopted December 29, 1880, the grantee company assigned all of its right, title, and interest in and to the grant of 1871 to the New Orleans Pacific Railway Company, and February 3, 1881, the assignee company accepted the conveyance. Admission No. 2, R. 77, 92, 93.

February 17, 1881, by letter to the assignee company, the Commissioner of the General Land Office recognized the validity of the transfer. R. 94. Thereupon the assignee company proceeded with the railroad construction.

Then came what is known as the "Blanchard-Robertson agreement." It originated in a protest by Messrs. Blanchard and Robertson, representatives from Louisiana, to the Secretary of the Interior, asking that the issuance of patents under the grant of 1871 be delayed until some arrangement could be made for the protection of settlers on the lands within the grant. Negotiations resulted in an agreement for

the protection of "settlers and occupiers" on the lands, which is contained in a letter dated January 4, 1882, from the president of the Company to Messrs. Blanchard and Robertson, and which reads as follows (R. 115; H. Rep. 2698, 49th Cong., 1st session, p. 16):

Settlers and occupiers of any of the lands aforesaid up to this date shall be given the right within twelve months from the register of the patents issued by the Government to the said company or its transferees for said lands, in the office of the clerk of the district court and ex-officio recorder of conveyance and mortgages of the parish where the land wanted by such settlers or occupiers is situated, to file their applications with the railroad company, through agents to be designated by the company for the purpose, for the land claimed or wanted by them; such settlers or occupiers shall at the time the title deeds are issued to them, pay one-third in cash of the price of the land so occupied or settled by them, and shall have one and two years from that time, with 6 per cent interest, in which to pay the remainder, mortgage and vendor's privilege to be retained by the company.

The price of land to be paid by such settlers or occupiers shall not exceed \$2 per acre, and the quantity of land to be claimed by each shall not exceed 160 acres.

Immediately upon the register of the patents in the office of the recorder of mortgages of the Parishes affected by the land grant, the railroad company shall give notice by publication for ten days in a newspaper in the Parish where

any settlers or occupiers live, and also by publication at the courthouse door of such Parish, the fact of the register of Patents, and that the company is ready to receive application from settlers and occupiers for the land wanted by them, and indicating the place where, and person to whom, application should be made.

Should this notice not be given immediately upon the register of the patents, these settlers and occupiers are to have twelve months in which to file their application from the time of the giving of such notice aforesaid. Proof of occupancy shall be the same as required by the laws of the United States for the acquisition of public lands, if required by the company.

It was stated in the Report of the House Committee on Public Lands, dated June 1, 1886 (Rep. No. 2698, 49th Cong., 1st session, p. 18; R. 117), that:

This agreement has been fully acquiesced in by the General Land Office, the railroad company, and the settlers, and has been the basis of all settlements made to adjust the troubles arising out of conflicting interests since it was adopted.

This was not the case, however, after the passage of the Act of February 8, 1887, 24 Stat. 391. Thenceforth lands settled upon and occupied in 160-acre tracts since prior to definite location of the road—October 27, 1881, and November 17, 1882—were treated as excepted from the grant and the patents issued thereunder and subject to entry by the settlers, and only those lands occupied by settlers after

the date of definite location and on December 1, 1884, were treated as passing by the grant and subject to purchase by the settlers from the Railway Company under the Blanchard-Robertson agreement. 13 L. D. 157, 161; 5 L. D. 686.

June 13, 1882, the Attorney General rendered an opinion to the Secretary of the Interior holding that the assignment of the grant of 1871, after condition broken but before a judicial or legislative declaration of forfeiture, was valid. R. 99.

November 17, 1882, the New Orleans Pacific Company filed maps in the General Land Office showing the definite location of its railroad line opposite the lands in suit. Admission No. 3, R. 77.

March 3, 1885, upon the construction and acceptance of certain portions of the railroad, and approval of indemnity selections, patents were issued to the Company embracing the lands in suit, except 120 acres of the quarter section in case No. 164, which was embraced in a patent issued August 8, 1889.¹

Notwithstanding the action taken in the Interior Department and the opinion of the Attorney General as to the validity of the assignment of the grant of 1871 after default, the Secretary of the Interior entertained grave doubts about the title of the assignee company, and therefore submitted to Congress the propriety of passing a curative act confirming that portion of the grant lying opposite to the constructed road. The act of February 8, 1887, resulted. 13 L. D. 157, 159.

¹ These patents will be more particularly referred to in separate statements of the cases hereafter.

By the Act of February 8, 1887, 24 Stat. 391, a portion of the grant of 1871 was forfeited and restored to the public domain, § 1. The portion not forfeited was confirmed by § 2 to the New Orleans Pacific Railway Company as assignee of the original grantee, excepting lands occupied by actual settlers at the date of definite location and still possessed by them or their heirs or assigns. Section 2 reads as follows:

SEC. 2. That the title of the United States and of the original grantee to the lands granted by said act of Congress of March third, eighteen hundred and seventy-one, to said grantee, the New Orleans, Baton Rouge and Vicksburg Railroad Company, not herein declared forfeited, is relinquished, granted, conveyed, and confirmed to the New Orleans Pacific Railroad Company, as the assignee of the New Orleans, Baton Rouge and Vicksburg Railroad Company, said lands to be located in accordance with the map filed by said New Orleans Pacific Railway Company in the Department of the Interior October twenty-seventh, eighteen hundred and eighty-one, and November seventeenth, eighteen hundred and eighty-two, which indicate the definite location of said road: *Provided*, That all said lands occupied by actual settlers at the date of the definite location of said road and still remaining in their possession or in possession of their heirs or assigns shall be held and deemed excepted from said grant and shall be subject to entry under the public land laws of the United States.

This confirmation was made conditional upon acceptance by the Company of "the provisions of this Act" to be filed with the Secretary of the Interior.

§ 3.

The remainder of the Act relates entirely to the rights of settlers and occupants on the lands within the grant, both patented and unpatented, and reads as follows:

SEC. 4. That it shall be the duty of the Secretary of the Interior, in issuing patents for the lands conveyed herein, to establish such rules and regulations as to enable all persons who on the first day of December, eighteen hundred and eighty-four, were in the actual occupancy of any of the lands to which the New Orleans Pacific Railroad Company is entitled under the provisions of this act, and who are of the description of persons entitled to make homestead or preemption entry on public lands under the general laws of the United States, to secure titles to the lands so held by them, not to exceed in quantity one quarter-section and not less than one-sixteenth of a section, on the payment to said company, in lawful money of the United States, at the rate of two dollars per acre, for the lands so occupied, at one-third cash, and balance in such equal annual installments as the Secretary of the Interior shall by regulations prescribe; it being the intention of this section to protect the settlers upon said lands, and to give binding force and effect to the Blanchard-Robinson agreement made with the New Orleans Pacific Company on the fourth day of January, eighteen hundred

and eighty-two, and filed in the office of the Secretary of the Interior.

SEC. 5. That the Secretary of the Interior shall make all needful rules and regulations for carrying this act into effect, and shall have the authority to direct, if he shall think proper, and shall so declare in such regulations, that payments may be made for the lands held and occupied under the fourth section of this act in not exceeding four equal annual installments from the date of sale, with interest thereon not to exceed six per centum per annum.

SEC. 6. That the patents for the lands conveyed herein that have already been issued to said company be, and the same are hereby, confirmed; but the Secretary of the Interior is hereby fully authorized and instructed to apply the provisions of the second, third, fourth, and fifth sections of this act to any of said lands that have been so patented, and to protect any and all settlers on said lands in all their rights under the said sections of this act.

April 20, 1887, in compliance with the condition in § 3, the Railway Company filed its acceptance of the Act with the Secretary of the Interior. R. 157, 190; 5 L. D. 687.

June 8, 1887, regulations established by the Secretary of the Interior in execution of the Act were sent to the local land office. R. 189; 5 L. D. 686. Respecting the proviso to § 2 of the Act, it was said:

This provision applies to the patented as well as to the unpatented lands.

To govern applications to enter by settlers under § 2 of the Act, and contests between such entrymen and the Company it was provided (R. 190):

When claimants under this section present proper applications to enter, you will notify the company thereof, and allow thirty days in which to file objections. If no objection is made within the time allowed, you will allow the entry, and in making your returns thereof you will transmit, with the entry papers, the documents showing the previous action taken.

If the company should object, you will order a hearing in the usual manner, and, upon the conclusion of the trial, transmit the testimony to this office accompanied by your joint opinion thereon.

To govern purchases under § 4 it was provided (R. 191):

Upon the receipt of any proper application to purchase under the fourth section of the act, you will notify the company thereof and allow thirty days within which to file objections.

If no objection is made the applicant will be held and deemed to have a valid claim and right of purchase in the land applied for, and you will so notify the company. Should the company object, you will order a hearing and proceed as directed under section 2.

For the protection of settlers and occupants on patented lands under both §§ 2 and 4, the following was provided:

In all cases under section 2 where the rights of entry under the laws of the United States

shall have been fully established to lands which have been patented to the company, the latter will be required to reconvey such lands to the United States, to the end that no cloud may rest upon the title of the entryman.

In cases where the right of purchase under the fourth section of the act shall be established, the railroad company will be required, either to convey the land to the applicants upon receipt of the first payment, and secure itself for the deferred payment by liens upon the lands sold, or to enter into such contracts to convey the lands upon receipt of the final installment paid in the manner below prescribed, as shall be satisfactory to this office.

With respect to the deferred payments under § 4 it was provided that (R. 192)—

the balance of the purchase money shall be paid in four equal annual installments from the date of the sale, and interest on the deferred payments shall be at the rate of six per centum per annum.

In each of the cases at bar there was an application to enter a quarter section of land under the homestead law, alleging settlement and continued occupancy since prior to definite location of the railroad in conformity to § 2 of the Act of 1887; a contest by the Railway Company; and a decision in favor of the entryman by the local land officers, which was affirmed on appeal by the Commissioner of the General Land Office.¹

¹ The various circumstances of these proceedings will be shown hereafter in separate statements of the cases.

August 3, 1892, to procure the early approval of selection lists which were being held up pending adjustment of settlers' claims under the Act of 1887, the Railway Company executed and filed in the Interior Department the following agreement (Admission No. 4, R. 77, 159; 15 L. D. 576):

1. That all appeals now pending before the Secretary of the Interior from decisions of the Commissioner of the General Land Office adjudging that the adverse claimants were actual settlers at the date of definite location of said railway company's road shall be, and they are hereby, withdrawn, to the end that said settlers may obtain patents for said lands.
2. That neither said railway company nor said trustees will hereafter take appeals to the Secretary of the Interior from decisions of the Commissioner of the General Land Office adjudging that the adverse claimants were actual settlers at the date of definite location of the said railway company's road, but, to the end that said settlers may obtain patents for said lands, said adjudication by the said Commissioner shall be regarded as final.
3. That in cases where patents have issued to said railway company for lands which have been or may hereafter be adjudged by the Commissioner of the General Land Office to have been in the possession of actual settlers at date of the definite location of said railway company's road, and title is in said railway company, said railway company and said trustees agree to make without delay conveyance thereof to the United States; and where such

lands have been sold by said railway company to third persons, said railway company undertakes to recover title thereto without delay and convey the same to said settlers or to the United States, and the said trustees undertake to join in such conveyances and to do all acts necessary on their part to enable the railway company to carry out this agreement and stipulation.

Acting upon this agreement the Secretary of the Interior instructed the Commissioner of the General Land Office as follows (15 L. D. 576, 577):

In accordance with the first provision of this agreement, all appeals now pending before this Department from decisions of your office, in which it has been adjudged that the adverse claimants were actual settlers at the date of the definite location of the road, are hereby dismissed, but the records will be returned with separate letters.

In a large number of these cases patents have heretofore issued to the company covering the lands embraced therein, but, under the third provision of the agreement, the company should be called upon to restore the title to the United States, in order that the claimants may be permitted to complete entries for the lands claimed at the earliest day possible.

Under this liberal concession on the part of the company, all unadjudicated cases pending in your office should be speedily settled, and the grant thus adjusted.

All of the tracts involved in the cases at bar were sold and conveyed to parties other than the claimant

settlers by the Railway Company subsequently to the Act of 1887, except 80 acres of the tract in No. 166 which was conveyed August 21, 1886. All of these conveyances were prior to the Railway Company's agreement of 1892, except 120 acres of the tract in No. 164 which was made June 28, 1900. All of the conveyances were for a price paid which was fair at the time of purchase. All of the lands ultimately passed through mesne conveyances to various lumber companies who are parties defendant.¹

The Railway Company failed to comply with its agreement of 1892 to restore patented tracts which it had sold and conveyed, including the tracts involved in the cases at bar, and on February 27, 1901, the United States filed a bill in equity against the Railway Company and numerous purchasers of the tracts to cancel the patents in so far as they embraced the lands which had been awarded to settlers by the Land Department. Numerous delays occurred in the prosecution of that suit on account of the multitude of parties and difficulties in securing service on nonresidents, and the case is still pending and undetermined. Admission No. 18, R. 82, 184. It finally developed that the holders of the apparent record titles to the lands in the cases at bar were not parties to the first suit, and, in order to avoid further complication by bringing in new parties, the present suits were brought January 21, 1915.

¹ The various data respecting these conveyances are shown hereafter in the separate statement of each case.

Statement in No. 164.

Land involved.—NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, N. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, Sec. 13, T. 2 N., R. 7 W., L. M., 160 acres (R. 10).

Patents to N. O. P. Ry. Co.—March 3, 1885, indemnity land, SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, 40 acres; August 8, 1889, indemnity land, NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ and N. $\frac{1}{2}$ of NE. $\frac{1}{4}$, 120 acres. Admissions 1, 11, R. 77, 79, 85, 89.

Sales by Railway Company.—June 13, 1890, defendant River Land and Lumber Company, NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, 40 acres, in patent of 1889; June 28, 1900, defendant W. R. Pickering Lumber Company, N. $\frac{1}{2}$ of NE. $\frac{1}{4}$, 80 acres, in patent of 1889, and SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, 40 acres, in patent of 1885. Admissions 8, 14, R. 78, 80, 31-32, 38, 41.

Land Department proceedings (R. 233).—August 10, 1888, application of intervener Jasper J. Brown, to enter under the homestead law (R. 237). September 4, 1888, objection of Railway Company filed in local land office (R. 240). October 12, 1888, hearing of railroad contest in local land office (R. 241-261). Thereupon the decision of the Register and Receiver was rendered as follows (R. 261-262):

This is an application to enter lands under the homestead laws as provided in Section 2 of the Act of Congress approved 8th day of Feby. 1887. The land applied for being the NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, N. $\frac{1}{2}$ of NE. $\frac{1}{4}$, and SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, of sec. 13, T. 2 N., R. 7 W., La. Mer. The same land being included in the selection of the New Orleans Pacific Railway Co., made March 3rd, 1885, and approved.

The testimony shows that the claimant, Jasper J. Brown, took possession of this land in the year 1881, and made a settlement thereon and placed substantial improvements upon the land and has occupied the same as a home and has cultivated a portion of the land in crops of corn and cotton each year since 1881, and has made it his only place of residence and home for his family.

After examining the testimony and hearing the evidence of the witnesses, we are of the opinion that the claimant has established his right to be allowed to enter the land applied for and we therefore do now recommend that Jasper J. Brown be allowed to enter under the homestead laws the land he has applied for, namely, The NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, N. $\frac{1}{2}$ of NE. $\frac{1}{4}$, and SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, sec. 13, T. 2 N., R. 7 W., La. Mer., and that the opposition of the New Orleans Pacific Ry. Co. be dismissed.

December 29, 1888, the Railway Company appealed to the Commissioner of the General Land Office (R. 262); and December 1, 1891, the Commissioner affirmed the local office and said (R. 268):

The testimony shows that Brown began his settlement on the land in the Spring of 1881, and continuous residence and improvement thereafter.

As shown by the testimony, Brown was at the date of definite location of the road an actual settler upon and occupant of the land, and his occupancy and improvement have been continuous. He therefore comes clearly within, and his claim is confirmed by the second section of the Act of February 7, 1887,

aforesaid. The claim of the company is accordingly rejected; and its selection of the unpatented tract held for cancellation, subject to the right of appeal within sixty days. Should this decision become final, the proper steps will be taken to recover title to the tracts which have been patented to the company, to the end that Brown may be given title to the land in its entirety.

January 2, 1892, the Railway Company appealed to the Secretary of the Interior (R. 264-265), but this appeal was withdrawn in accordance with the agreement of August 3, 1892 (R. 269). March 2, 1893, the Commissioner made demand on the Railway Company through its attorney of record to restore the land in accordance with its agreement of August 3, 1892, but without result (R. 287, 225).

The facts found by the Land Department as to occupation and possession were also shown by independent testimony at the trial in the District Court (R. 193-215).

Statement in No. 165.

Land involved.—NW. $\frac{1}{4}$, Sec. 3, T. 3 N., R. 8 W., L. M., 160 acres (R. 8).

Patent to N. O. P. Ry. Co.—March 3, 1885, indemnity land. Admissions 1, 11, 13, R. 52, 54, 57.

Sale by Railway Company.—April 1, 1889, defendant W. R. Pickering Lumber Company. Admissions 8, 14, R. 53, 55, 47.

Land Department proceedings (R. 106).—August 5, 1896, the intervener William R. Turner filed applica-

tion in the local land office to enter under the homestead law (R. 110). December 26, 1896, the Railway Company filed objections (R. 114). January 23, 1897, the contest was heard (R. 118-121). January 29, 1897, the Register and Receiver rendered their decision as follows (R. 121-122):

The proof in this case shows that this tract was first settled upon by the contestant, William R. Turner, in 1872. That he is a native-born citizen of the United States and was the head of a family at the date he settled upon the place. That he has never taken advantage of the homestead law, nor owned any land until about seven years ago his father died, when he inherited from estate about 100 acres adjoining this tract; that ever since he settled upon the place in 1872 he had improved, cultivated and made it a home for himself and family up to the present date.

We are therefore of the opinion that the application of contestant to enter should be accepted and the objections of the New Orleans Pacific Railway Company should be dismissed.

February 8, 1897, the Railway Company appealed to the General Land Office (R. 123), and August 10, 1898, the Commissioner by letter to the local officers affirmed their decision and said (R. 125):

The evidence adduced shows that said Turner settled on the land in question in 1872; that he has since continuously resided on and cultivated said tract, and that he built a dwelling house thereon, cleared about thirty acres of the land, and has about one hundred acres under fence.

As the land was in the occupancy of the said Turner, a bona fide settler, at the date of the Company's selection thereof, it was not subject to selection, and I must, therefore, affirm your decision and reject the Company's claim thereto.

The Receiver for the Company will be requested to reconvey said tract to the United States in order that said Turner may consummate his claim thereto by entry thereof.

Thereupon demand was made by the Commissioner on the Receiver of the Railway Company for reconveyance of the land (R. 126), who answered August 18, 1899, that the Company had sold the land by deed dated April 1, 1889, and he was therefore "unable to furnish the desired reconveyance" (R. 128).

The facts as to occupation and possession found by the Land Department were also shown by independent testimony at the trial in the District Court (R. 95-103).

Statement in No. 166.

Land involved.—S. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and N. $\frac{1}{2}$ of SW. $\frac{1}{4}$, Sec. 3, T. 3 N., R. 7 W., L. M., 160 acres (R. 8).

Patent to N. O. P. Ry. Co.—March 3, 1885, primary or place land. Admissions 1, 10, R. 76, 79, 200.

Sales by Railway Company.—August 21, 1886, S. $\frac{1}{2}$ of NW. $\frac{1}{4}$, 80 acres, and June 23, 1888, NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$, 40 acres, defendant Southland Lumber Company; April 1, 1889, NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, 40 acres, defendant W. R. Pickering Lumber Company. Admission 11, R. 79, 36-37, 29.

Land Department Proceedings (R. 160).—December 20, 1890, the intervener Stephen N. Grant, as assignee of Thomas J. Killen, made application at the local land office to enter under the homestead law (R. 161–163). February 25, 1891, the Railway Company filed objections (R. 164). April 6, 1891, the contest was heard (R. 164–174). Thereupon the Register and Receiver rendered the following decision (R. 175):

It is shown by the testimony that the claimant, Stephen N. Grant, is a settler in good faith on said tract of land above described, since 1885; that he purchased from T. J. Killen for a valuable consideration all his rights and interests thereto, with the improvements thereon. That said T. J. Killen's claim of title is traced back, through several previous settlers, to the year 1876; that the said tract has been occupied, cultivated and resided upon by the successive settlers thereon, without interruption from the said year 1876 to the present time. Hence it follows that the occupation and cultivation of said tract of land, and residence upon same, by the successive settlers, have been continuous and are prior to the date of definite location by the N. O. Pacific Ry. Co., viz: Nov. 17, 1882.

We therefore recommend that the objections of the New Orleans Pacific Ry. Co. be dismissed, and that the claimant, Stephen N. Grant, having complied with all the requirements of law to establish his homestead claim, be allowed to enter under the homestead laws the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of section 3, in Tp. 3 N. of R. 7 W. La. Mer.

May 26, 1891, the Railway Company appealed to the General Land Office (R. 177); and February 26, 1896, the Commissioner by letter to the Register and Receiver affirmed their decision, saying (R. 181):

The testimony shows that the land has been occupied and cultivated continuously for fifteen years prior to the hearing, that there had been a number of transfers made for said tracts; that the claimant purchased in the year, 1885, from a prior settler and established his residence thereon and has continuously cultivated the land.

As the land was occupied by an actual settler at the date of definite location, and is in the possession of the homestead claimant, as the assignee of such settler, the claim is protected by the second section of the Act of February 8th, 1887, and the land was erroneously patented to the railway company.

In accordance with the agreement filed by the company and embodied in Departmental letter of December 15, 1892 [15 L. D. 576], the claim of the company is rejected and the case closed.

The company will be requested to reconvey the tracts to the United States, in order that said Stephen N. Grant may enter the same under the homestead laws.

Thereupon demand was made by the Commissioner upon the Railway Company through its attorney of record to make restitution of the land in accordance with its agreement of August 3, 1892, but without result (R. 182).

The facts as to occupancy and possession found by the Land Department were also shown by independent testimony at the trial in the District Court (R. 123-144).

The questions presented.

Under the assignments of errors, which are the same in all the cases, the following propositions are presented:

1. The United States has the capacity to maintain these suits because of its obligation to the interveners and its duty to the public.
2. The effect of the Act of February 8, 1887, was to reserve from the grant and except from the railroad patents the lands in question for the benefit of the interveners.
3. The suits are not barred by limitation, because:
 - (a) The suits are to establish title by enforcing an exception rather than to vacate or annul patents.
 - (b) The lands are not claimed by the Government in its own sole interest as public lands, and it is only to such lands that the limitation applies.
4. The suits are not barred by laches, because:
 - (a) The intervening claimants have always been and are still in the hands of the Government, against whom laches is not chargeable.
 - (b) The claimants having the right to rely upon their possession and the decision of the Land Department, it is not they but the defendants who are guilty of laches.
5. The defendant Lumber Companies are not bona fide purchasers.

ARGUMENT.**I.****Capacity of the United States to maintain the suits.**

It is settled law that the United States has capacity to sue, at the instance of the Attorney General, to establish the title of an individual to property in which the Government has no pecuniary interest, where it is nevertheless under an obligation to the individual or owes a duty to the public to take such action. *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 285-286; *United States v. Bell Tel. Co.*, 128 U. S. 315, 368. And it has been held that such obligation and duty exist to enforce the rights of settlers to land reserved for them from a railroad grant to which the apparent title has passed to the Railroad Company by an unauthorized patent. *United States v. Missouri &c Railway*, 141 U. S. 358, 379-382.

In the present instance the obligation and duty of the Government are even more definite. Under the Act of February 8, 1887, any lands within the limits of the grant awarded to settlers or their heirs or assigns under § 2 by the Land Department were excepted from the grant and made subject to entry by the claimants, notwithstanding they were embraced in patents to the Railway Company. The right of the claimants to the lands in these cases was determined by the action of the Department, in which the Company acquiesced. The Secretary of the Interior was charged with the duty to protect them "in all

their rights." § 6. Full protection to the claimants necessitated judicial decrees to establish their titles against the outstanding patents of the Railway Company and sales made by it to third parties. For this the Secretary properly evoked the functions of the Attorney General, and these suits resulted.

II.

Effect of the Act of February 8, 1887.

A.

Lands excepted by Section 2.

The questions arising in these cases all depend upon the effect of the Act of February 8, 1887, 24 Stat. 391, and that depends upon the meaning of the proviso to section 2 which reads as follows:

Provided, That all said lands occupied by actual settlers at the date of the definite location of said road and still remaining in their possession or in possession of their heirs or assigns shall be held and deemed excepted from said grant and shall be subject to entry under the public land laws of the United States.

The decisive question is whether this provision applies to patented as well as unpatented lands. Standing alone it would not naturally be applicable to patented lands because of the final clause which says that the lands affected "shall be subject to entry under the public land laws." But the plain language of section 6 can not be given its necessary

effect without holding that the proviso to section 2 applies to patented lands. Section 6 reads:

That the patents for the lands conveyed herein that have already been issued to said company be, and the same are hereby, confirmed; but the Secretary of the Interior is hereby fully authorized and instructed to apply the provisions of the second, third, fourth, and fifth sections of this act to any of said lands that have been so patented, and to protect any and all settlers on said lands in all their rights under the said sections of this act.

This section deals specifically with "the patents for the lands conveyed herein that have already been issued to said company," and requires the provisions of the second section to be applied "to any of said lands that have been so patented." So that the provision in section 2 for "entry under the public-land laws" must mean that such entries should be allowed to settlers of the specified class notwithstanding the land so entered might be embraced in outstanding patents to the Company. The words of the Act do not appear to admit of any different interpretation.

B.

Administrative Interpretation.

This has always been the view of the Land Department. Under the requirement of section 5 "that the Secretary of the Interior shall make all needful rules and regulations for carrying this Act into effect,"

regulations were established June 8, 1887, 5 L. D. 686, in which it was said in reference to the proviso to section 2 (p. 687):

This provision applies to the patented as well as to the unpatented lands.

Instructions were accordingly given for the reception of homestead entries on the patented lands by settlers or their heirs or assigns who could qualify under section 2, for notice to the Railway Company and for the hearing of objections by it. No different regulations have ever been established, but under these the grant has been very largely adjusted with the acquiescence of the Railway Company. The Company appeared in the local land office and contested upon their merits the entries made on patented lands, appealed to the General Land Office from decisions allowing the entries, and then, to facilitate an early adjustment of the grant, agreed to and did accept all decisions of the Commissioner affirming the local land officers. Case No. 166, Admission 4, R. 77, 159; *New Orleans Pacific Ry. Co.*, 15 L. D. 576. And the Company did in fact, upon demand of the Land Department, make reconveyances to the Government for the benefit of such entrymen of all patented lands so determined to belong to them, except the lands which it had sold to third parties. Case No. 166, Admission 24, R. 86, 223.

C.

Distinction between Sections 2 and 4.

Yet it may be suggested, as it was in the Court of Appeals, that a different construction of section 2 is required by section 4 of the Act, which reads as follows:

SEC. 4. That it shall be the duty of the Secretary of the Interior, in issuing patents for the lands conveyed herein, to establish such rules and regulations as to enable all persons who on the first day of December, eighteen hundred and eighty-four, were in the actual occupancy of any of the lands to which the New Orleans Pacific Railroad Company is entitled under the provisions of this act, and who are of the description of persons entitled to make homestead or preemption entry on public lands under the general laws of the United States, to secure titles to the lands so held by them, not to exceed in quantity one quarter section and not less than one-sixteenth of a section, on the payment to said company in lawful money of the United States, at the rate of two dollars per acre, for the lands so occupied, at one-third cash, and balance in such equal annual installments as the Secretary of the Interior shall by regulations prescribe; it being the intention of this section to protect the settlers upon said lands, and to give binding force and effect to the Blanchard-Robinson agreement made with the New Orleans Pacific Company on the fourth day of January, eighteen hundred and eighty-two, and filed in the office of the Secretary of the Interior.

It should be noted that section 4 like section 2 apparently applies only to unpatented lands, and that it is made applicable, along with section 2, also to patented lands by section 6. But sections 2 and 4 obviously apply to different classes of persons, deal with different kinds of occupancy, and confer different rights. Section 2 applies to actual settlers or their heirs or assigns; section 4 applies only to occupants in person. Section 2 requires occupancy at the date of definite location of the road—November 17, 1882—and continued possession to the date of the Act; section 4 requires only occupancy on December 1, 1884. By section 2 the lands affected are excepted from the grant and made subject to homestead entry by the claimants; by section 4 the lands affected pass by the grant and the claimants secure their titles from the Company.

This distinction between sections 2 and 4 was observed by the Land Department in the regulations established soon after the passage and acceptance of the Act (5 L. D. 686) and has been uniformly adhered to in the subsequent adjustment proceedings. In *New Orleans Pac. Ry. Co. v. Elliott*, 13 L. D. 157, 160, after quoting section 2, the Secretary said:

This proviso therefore expressly excepted from the grant all lands occupied by settlers, respectively, on October 27, 1881, and November 17, 1882, the dates of definite location of the New Orleans Pacific Railway.

But it is urged by counsel for the railway company that this proviso is repugnant to the 4th section of the act, and under the rules of

construction the earlier must give way to the later. They further insist that the Blanchard-Robertson agreement being made part of the act, must be referred to in order to determine the purpose and effect of section 4 of the act, and said agreement, as enforced by the act of February 8, 1887, provides a right of purchase for all "settlers and occupants," who, on the first day of December, 1884, were in the actual occupancy of any of the lands included within the limits of said grant to the New Orleans, Baton Rouge and Vicksburg Railroad, and withdrawn from market, whether settlement was made before or after definite location.

From an examination of the act, it is apparent that there is no such conflict, and that the rights secured by the 4th section refer to a different class of settlers and to lands that were confirmed to the New Orleans Pacific Railway Company by the act of February 8, 1887.

The proviso to the second section excepted absolutely from the grant or confirmation to the New Orleans Pacific Railway Company "all lands occupied by actual settlers at the date of the definite location of said road and still remaining in their possession or in possession of their heirs and assigns," and, as to these lands, it provided that they "shall be subject to entry under the public land laws of the United States."

The fourth section provided that all persons who, on the first day of December, 1884, were in actual occupancy "of any of the lands to which the New Orleans Pacific Railroad Company *is entitled under the provisions of this*

act," shall have the right to secure title to the lands so held by them, not exceeding one quarter section, "on the payment to said company," at the rate of two dollars per acre for the lands so occupied.

It is thus clearly shown that the "binding force and effect" intended to be given to the Blanchard-Robertson agreement by the act of February 8, 1887, was the right to purchase from the company lands which were confirmed to it by the act and which were in the actual occupancy of a settler on the first day of December, 1884, and has no reference whatever to lands "occupied by actual settlers at the date of the definite location of said road," which lands were by the express terms of the proviso to the second section absolutely excepted from the operation of the grant or confirmation to the road, and were declared to be "subject to entry under the public land laws."

Even if this question admitted of a doubt, it is the only construction that can be given to this act, without violating the well-known rule that effect is to be given, if possible, to every clause of the statute.

It was therefore concluded (p. 161)—

that if a settler was on the land at date of definite location it is excepted from the grant, and if a settler went on the land after definite location and prior to December 1, 1884, he is entitled to purchase from the company at two dollars per acre.

D.*Legislative History.*

The legislative history of the Act of 1887 confirms, if necessary, the view that the exception of § 2 applies to patented lands. The events preceding the Act are well summarized in *New Orleans Pacific Ry. Co. v. Elliott*, 13 L. D. 157, 158, as follows:

By act of March 3, 1871 (16 Stat. 579), a grant of lands was made to the New Orleans, Baton Rouge and Vicksburg Railroad Company, from New Orleans to Baton Rouge, and thence by way of Alexandria to connect with the eastern terminus of the Texas Pacific Railway Company, incorporated by said act. A map of general route of said road was filed from Baton Rouge to Shreveport, November 11, 1871, and from New Orleans to Baton Rouge February 13, 1873, and withdrawals were made thereon, respectively, November 29, 1871, and March 27, 1873. The line of road was never definitely located by said company, and, on January 5, 1881, it assigned all right, title and interest in the grant to the New Orleans Pacific Railway Company, which latter company definitely located parts of said road, respectively, October 27, 1881, and November 17, 1882.

A protest was filed in the Interior Department by E. W. Robertson and N. C. Blanchard, members of Congress from said State, protesting against the further recognition of said grant in favor of the assignees, until the rights

of certain settlers within the limits of said grant were protected, and, as the result of said protest, an agreement was entered into by said company, known as the Blanchard-Robertson agreement, whereby it was agreed, substantially, that settlers and occupants of lands within the limits of said grant, up to the date of said agreement (January 4, 1882), shall have the right to purchase the land occupied by them, to the extent of one hundred and sixty acres, at a price not to exceed two dollars per acre, in payments of one-third cash and the balance in one and two years at six per cent interest.

The validity of this assignment was questioned by the Department, and, although the Attorney General, on June 13, 1882, submitted, upon the request of the Secretary of the Interior, an opinion that the assent of Congress was not necessary in order to entitle the assignee to the benefit of the grant, yet the issuance of patents to this road was suspended, for the reason that the time allowed for the construction of the New Orleans, Baton Rouge and Vicksburg Railroad had expired, and the legislature of Louisiana had forfeited its charter before the assignment to the New Orleans Pacific Railway Company was made.

In view of these facts, it was considered by the Secretary of the Interior a matter of grave doubt whether the New Orleans, Baton Rouge and Vicksburg Railroad Company had the right to assign its whole grant to another road, and he therefore submitted to the consideration

of Congress the propriety of passing an act curative of the defect, if any existed, vesting the title originally granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company, from White Castle to Shreveport, in the New Orleans Pacific Railway Company.

The bill as reported by the Public Lands Committee of the House June 1, 1886 (Rep. No. 2698, 49th Congress, 1st session), and as it originally passed the House provided only for the carrying out of the Blanchard-Robertson agreement as to settlers. It did not contain the proviso to § 2 as enacted and provided only in § 6 as to patented lands for carrying out the provisions of § 4 "under the said Blanchard-Robertson agreement." In the Senate the bill was amended by adding the proviso to § 2, changing § 6 so as to make § 2 also applicable to patented lands, and striking out the words in § 6 which would have subjected both sections 2 and 4 to the Blanchard-Robertson agreement. Case No. 166, R. 85.

For the purpose of removing an ambiguity with reference to a change made in a bill in the course of its passage, statements made by the proponents of the amendment in debate may be resorted to. *United States v. St. Paul, M. & M. Ry. Co.*, decided June 3, 1918, and cases cited.

Senator Gibson of Louisiana was the author of the amendment which was adopted. He stated the scope and purpose of it in connection with a letter from a former member of Congress with whom the amend-

ment apparently originated, as follows (Cong. Rec. vol. 18, p. 761):

I refer to the Hon. E. T. Lewis. But he says in his letter to me, speaking in the interest of the settlers:

"The amendment is simply to except from the confirmation contained in section 2 the lands occupied by the settlers up to October 27, 1881, the date of the definite location of the line of the railroad, and to include these lands in the forfeiture contained in section 1. In addition to this another section should be added authorizing the Secretary of the Interior to restore such lands to the public domain, and directing that preference shall be given such settlers to make entry of such lands under the homestead law."

That is the effect of my amendment. It is to except from this grant or to forfeit against the railroad company all the lands that were in the actual occupancy of settlers up to the time of definite location, and after that time the Robertson and Blanchard agreement will prevail.

Senator Plumb, chairman of the Public Lands Committee and in charge of the bill, agreeing to the amendment on behalf of his committee, said (p. 767):

I will state that, so far as I have had any chance to confer with the members of the Committee on Public Lands, there is no objection whatever to the amendment of the Senator from Louisiana [Mr. Gibson].

Indemnity Lands.

It may also be argued, as it was in the courts below, that § 2 of the Act of 1887 does not apply to indemnity lands. The Act itself in none of its sections makes any distinction between primary and indemnity lands. One is as much granted as the other —the primary lands in place and the indemnity lands to be selected within certain limits. Every section of the Act deals with both patented and unpatented lands, and the patents issued March 3, 1885, two years before the Act, were for indemnity lands, as shown by the records in cases Nos. 164 and 165. See separate statements of cases, *supra*.

Constitutional Objection.

It was pleaded in the answers that the Act of 1887 could not affect the title to lands already patented to the Company because that would be a deprivation of property without due process of law. The answer to this is that the Act was not obligatory on the Company unless accepted by it, and the Company accepted. All of the sales made by the Company under which the Lumber Companies claim were made after the Act, except one 80-acre tract in case No. 166, which was sold August 21, 1886. See separate statements of cases, *supra*. As to this tract, the purchaser took with notice that the grant of 1871 was subject to forfeiture, and therefore subject to all

the conditions of confirmation in the Act of 1887. *New Orleans Pacific Railway Co. v. United States*, 124 U. S. 124, 127, 129; *Atlantic and Pacific Railroad v. Mingus*, 165 U. S. 413, 430; *New Orleans Pac. Ry. v. Elliott*, 13 L. D. 157, 161.

G.

Exception from the Patents.

What then was the effect of applying section 2 to patented lands? Clearly, as a matter of course, that the lands awarded to claimants under its provisions were excepted from the patents. Not otherwise could they be excepted from the grant and made subject to entry. The complete exclusion of such lands from the patents was made dependent upon their identification by the Land Department. But when so identified they were excepted out of the patents as much as if they had been excluded by the terms of conveyance. *Weeks v. Bridgman*, 159 U. S. 541, 545, 547, and cases cited. Otherwise the application of section 2 to patented lands would be without any effect or meaning.

H.

Rules of Construction.

If there were any doubt about this construction arising from the language of the statute or otherwise, it should be resolved in favor of the settler, with whom the law deals tenderly (*Northern Pacific Rail-*

road v. Amacker, 175 U. S. 564, 567; *Nelson v. Northern Pacific Railway*, 188 U. S. 108, 123, and cases cited), and against the grantee company, with whom the law deals strictly (*M. K. & T. Ry. Co. v. United States*, 235 U. S. 37, 41), and so as to agree with the uniform practice of the Land Department. *McMichael v. Murphy*, 197 U. S. 304, 312.

III.

The Statute of Limitations.

Two of the patents in question were issued in 1885 and another in 1889. The suits were filed January 21, 1915. The first section of the Limitation Act of March 2, 1896, 29 Stat. 42, provides:

That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought with five years from the passage of this Act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the second session of the Fifty-first Congress and amendments thereto is extended accordingly as to the patents herein referred to. But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed.

A.

Suits are to Enforce Exception rather than to Cancel Patents.

The first question here is whether these suits were brought to vacate or annul the patents in question. If we are correct in the proposition that the Act of 1887 intended to except the lands in question from the patents including them, the question is already answered: the suits may be regarded as brought to confirm and establish title by declaring and enforcing the exception, not necessarily to vacate or annul the patents.

Such appears to have been the nature of the suit brought in *Leavenworth &c. R. Co. v. United States*, 92 U. S. 733, 739. That was a case of a railroad grant to the State of Kansas under which a list of selections, having the force and effect of a patent, was certified under the authority of the Act of August 3, 1854, 10 Stat. 346, R. S. § 2449, and in the certified list were lands within an Indian reservation and therefore excepted from the grant. The Government sued to confirm and establish its title for the Indians on the theory that although the lands were described in the list they were not embraced in the conveyance. The decree prayed for was granted and this court affirmed the decision.

Similar also was the suit in *Lee Wilson & Co. v. United States*, 245 U. S. 24, in which the Government "sought a decree quieting its title" to certain parcels of land claimed by the defendant under a patent by

virtue of riparian proprietorship (p. 26), and in which it was held that the suit was not "an attempt to vacate or annul the patent." p. 32.

True, it is prayed in the present bills that the patents be cancelled in so far as they embrace the lands belonging to the claimants. But this may be regarded as a mere formal imperfection which should not control the right to appropriate relief. Under the prayer for general relief the court may grant any relief justified by the facts stated in the bill and appearing in proof. *Hopkins v. Grimshaw*, 165 U. S. 342, 358.

In *Oregon & Cal. R. R. v. United States*, 238 U. S. 393, the suit involved a railroad land grant, and "the bill prayed a forfeiture of the unsold lands and that the title of the Government thereto be quieted, or, if such relief be denied, that the lands be adjudged subject to purchase by actual settlers" according to the condition of the grant. p. 397. Neither of these prayers was granted, but the bill was sustained as "one to enforce a continuing covenant," p. 428, and an injunction was granted against further sales or cutting of timber until Congress might have an opportunity to act in the matter.

To carry this proposition further, we contend if necessary that the railroad patents, read as they must be in connection with the Act of 1887, do not even purport to convey the lands in question. The Department might well have issued homestead patents to the claimants conveying to them the titles to the lands awarded to them under the Act of 1887. This

has been the practice in cases of lands excepted from grants to States and Territories and embraced in certified lists of selection which, under the Revised Statutes, § 2449, are given the force and effect of patents; and this court has sustained the practice.

Weeks v. Bridgman, 159 U. S. 541, was an action at law by one holding under a deed from the State of Minnesota for land embraced in a certified list of selections made under a grant to the State to aid in the construction of a railroad. The defendant claimed under a preemption patent issued by the Land Department after the certification. The preemption claim had attached prior to definite location of the railroad, and was therefore excepted from the grant by the terms of the granting act. Judgment was given for the defendant and this court, affirming the decision, said (p. 545) :

The line of the road was definitely fixed December 20, 1857; the lands within the place limits then subject to the grant were thereby segregated from the public domain and the grant took effect thereon. But under the granting act, lands to which preemption rights had attached, when the line was definitely fixed, were as much excepted therefrom as if in a deed they had been excluded by the terms of the conveyance.

And again (p. 547) :

As we have seen, this particular land was not included in the grant, and the Secretary of the Interior had so decided on August 30, 1861, when he determined that the preemption

right had attached. And since it was not so included nor subject to disposition as part of the public domain, on October 25, 1864, the action of the Land Department in including it within the lists certified on that day was ineffectual. * * *

As against Brott [the preemption claimant] the certification had no operative effect.

Reading the railroad patents in these cases in connection with the Act of 1887, as the certification in the *Weeks* case was read in connection with the Act of August 3, 1854, 10 Stat. 346, R. S. § 2449, the result is that the patents here like the certification there were ineffectual to convey the excepted lands. As to such lands the patents "had no operative effect." It follows that the patents in question, read in connection with the law which governs them, do not purport to convey the excepted lands, and the limitation statute can not operate upon them. This point was discussed in an elaborate opinion rendered by the Attorney General to the Secretary of the Interior November 19, 1915, with respect to a certification of indemnity lands to the State of Colorado under the school grant to that State which excepted mineral lands, and it was there said:

The third question is whether the jurisdiction of your Department over the excepted land can be exercised after the lapse of the limitation period prescribed in the act of March 3, 1891. Section 8 of that act provides (26 Stat. 1099):

"That suits by the United States to vacate and annul any patent heretofore issued shall

only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patent."

The certification in question is an authorized method of conveying title and therefore may be said to have the force and effect of a patent. But it is so authorized and has such force and effect only by virtue of the statute upon which it is founded. Without the statute it is unauthorized and has no force or effect whatever. Read, as the certification must be in order to have any force or effect, in connection with section 2449 of the Revised Statutes, mineral lands which were known to be such at the time of the selection by the State, are excepted from its operation. As to such lands, the certification, under the statute, does not purport to convey any title. Hence, even though the limitation statute should be held to bar a suit by the United States to cancel or annul a certification or to confirm the title which it purports to convey, as to which no opinion is expressed (see *United States v. Chandler-Dunbar Co.*, 209 U. S. 447, 450; *Shaw v. Kellogg*, 170 U. S. 312, 341; *United States v. Winona, etc., R. Co.*, 165 U. S. 463, 476; *Louisiana v. Garfield*, 211 U. S. 70, 77), nevertheless lands excepted from its operation are not thereby affected.

The third question therefore is answered in the affirmative.¹

¹ This opinion is not reported and is therefore printed in full as an appendix hereto. It governs the present practice of the Land Department.

B.*Lands not Public Lands in Statutory Sense.*

But viewing the patents to the Railway Company as conveying the legal title to the excepted lands, and the suits therefore as brought to cancel the patents to that extent, yet the suits are not within the statute because the lands in question were not of the class to which the statute was intended to be confined, that is, they were not public lands in the statutory sense.

In *United States v. Winona &c Railroad*, 165 U. S. 463, 476, it was said that an erroneous or fraudulent railroad patent would be made conclusive by the limitation statute "providing only that the land was public land of the United States and open to sale and conveyance through the land department." And again (p. 481) that the title of purchasers in good faith would be confirmed, provided "the lands were public lands in the statutory sense of the term, and free from individual or other claims."

In *Nor. Pac. Ry. Co. v. United States*, 227 U. S. 355, 367, it was said that the Limitation Act of 1896 "manifestly applies only to the public lands of the United States subject to acquisition under the laws enacted for the disposition of the public domain." It was therefore held not to bar a suit to cancel patents issued to the Northern Pacific Railway Company under its grant because the lands affected by the suits were a part of an Indian reservation.

In that case the lands in question were reserved for the benefit of the Yakima Indians; in these cases the lands in question were reserved for the benefit of actual settlers in possession who were recognized as having vested rights. We say "vested rights" because they were rights recognized as inheritable and assignable and because the lands to which they attached were not subject to other disposition. It is not to be presumed that Congress intended to deal less tenderly with these old settlers in reserving their homesteads from this railroad grant than it did in reserving lands in other cases for recalcitrant Indians.

In the ordinary case of lands excepted from a railroad grant because of occupancy in good faith by homestead settlers, at the time of definite location of the railroad as to primary lands or at the time of selection as to indemnity lands, it is settled that such lands are not public lands in the statutory sense. In *Osborn v. Froyleyseth*, 216 U. S. 571, 578, a case of indemnity lands, it was said:

But it is urged that the mere fact that there was no record evidence of the homestead claim when the selections of 1891 were made was enough to give efficacy to that selection and vest the legal title under the patents thereafter issued. But this is answered by what we have already said, namely, that if at that date this land was actually occupied by one qualified under the law, who had entered and settled thereon before that time, with the intent to claim it as a homestead, the land had ceased to be public land and as such subject to selection as lieu land.

In *Northern Pacific Railway v. Trodick*, 221 U. S. 208, 215, a case of primary lands, it was said:

In view of the authorities cited, it must be taken that by reason of Lemline's actual occupancy of them as a bona fide homestead settler, at the time of the definite location of the railroad line, these lands were *excepted from the grant* and the railroad company did not acquire and could not acquire any interest in them *by reason of such location*. So that the issuing of a patent to it in 1903, based on such location, was wholly without authority of law. So far as the railroad company was concerned, the way was open to Trodick, who had purchased the improvements from Lemline and was in actual possession of the lands as a residence, to carry out his original purpose to make application to enter them under the homestead laws, and thus acquire full technical title in himself. [Italics by the court.]

In *Railroad Company v. Amacker*, 175 U. S. 564, 570, the court said:

Counsel for the railroad company contend that this right of McLean to purchase this tract was no other or different than the right of any duly qualified citizen of the United States to purchase any tract of public lands, and that as this right had not been exercised at the time the line of definite location was fixed, it could not be said that at that time any right had attached. But we think it is not a true construction of the land laws that a specified right given to a limited class to take by

purchase particular tracts is in any just sense the equivalent of the general right of all citizens to purchase public lands. It is not a strained but a reasonable construction to hold that Congress by this act of 1880, "appropriated" these particular tracts, thus covered by homestead entries, even of an outlawed class, for the benefit of those homesteaders, and that they were no longer to be counted among the public lands of the United States subject to the grant to the railroad company.

The case of *United States v. Chandler-Dunbar Co.*, 209 U. S. 447, is easily distinguishable. It was there held that the Limitation Act of March 3, 1891, § 8, 26 Stat. 1099, confirmed the title to land included in a patent which had been temporarily reserved by the President from sale and disposition, and the court said (p. 450) :

This land, whether reserved or not, was public land of the United States and in kind open to sale and conveyance through the Land Department. *United States v. Winona & St. Peter R. R. Co.*, 165 U. S. 463, 476. The patent had been issued in 1883 by the President in due form and in the regular way. Whether or not he had authority to make it, the United States had power to make it or to validate it when made, since the interest of the United States was the only one concerned.

The court did not discuss the character of the temporary reservation as showing that the land in question "was public land of the United States and in kind open to sale and conveyance through the Land

"Department," and that "the interest of the United States was the only one concerned." This appears, however, in the opinion of the Circuit Court of Appeals, reported in 152 Fed. 25. The court there said, referring to the limitation statute (p. 29):

When it speaks of vacating or annulling patents, of course it means the grants of title which the patents purport to make, and which the United States had lawful right to make. Doubtless this would not extend to lands reserved by treaty, and probably not to lands which had at the date of the statute been taken out of its power of disposition in favor of other parties who had acquired contingent interests therein, though the prospective part of the statute, not quoted above, might perhaps cover such lands if they should fall back into its absolute control. Having regard to the objects of the statute, we can not doubt that it was intended to reach and cover, after the lapse of the prescribed period, any such mistake of the land department (assuming it to be such) as the holding that the temporary reservation of the lands in question by the President's order of 1847 was discharged by his releasing order of December 9, 1852.

And again, referring to the character of the reservation (p. 30):

This land was, in a larger sense, open to sale by the United States. There had been no absolute reservation of it. There was only a temporary reservation of it which operated only as a temporary suspension of sales by order of the

President, for his own convenience, until he should be prepared to make the reservations intended by Congress. And the purpose of the suspension had been accomplished more than 30 years before the issue of the patent to Chandler. Even if the reservation of 1847 had survived the release of 1852 and continued to have its exhausted hold upon all the lands originally reserved, the sale of this land in 1883 would amount to nothing more than a technical error or mistake of the land department, which, if it needed curing, the statute would cure.

The *Chandler-Dunbar* decision is thus seen to be very far from holding that lands reserved in public trust for the exclusive benefit of actual settlers in possession, as in the cases at bar, are public lands in the statutory sense.

The Court of Appeals held that the lands reserved by the proviso to § 2 of the Act of 1887 were yet public lands in the statutory sense because they were made "subject to entry under the public-land laws." The effect of this ruling is that the lands were reserved for general entry by the first applicant qualified to enter public lands. This would destroy the whole purpose of the proviso. The purpose was—as plain as words could declare it—to reserve for the exclusive benefit of actual settlers or their heirs or assigns lands occupied by them in 160-acre tracts since prior to November 17, 1882, and still remaining in their possession. Hence the words, "subject to entry under the public land laws," can

not but mean that the reserved lands were to be subject to such entry by such claimants exclusively; and so the Land Department has uniformly read and administered this provision.

The ruling of the Court of Appeals is in the very teeth of the *Chandler-Dunbar* decision upon which it relies, for the point of that decision was that, with respect to the reservation there under consideration, "the interest of the United States was the only one concerned." 209 U. S. 450. As said in *Winona &c. Railroad v. United States*, 165 U. S. 483, 486: "Only the purely technical claims of the Government were waived." So, when rightly considered, as said in *Lee Wilson & Co. v. United States*, 245 U. S. 24, 32, "the ruling in *United States v. Chandler-Dunbar Co.*, 209 U. S. 447, instead of sustaining, is in conflict with the proposition." In the present instance the Government reserved no interest to itself other than the obligation to protect the beneficiaries of the reserved lands "in all their rights" thereto; and this obligation the Secretary of the Interior was directed by § 6 of the Act to discharge. He discharged the obligation as far as his functions would permit by awarding to the beneficiaries of the statute the *exclusive* right of entry.

IV.

Laches.

The Court of Appeals held that these suits were barred by laches of the interveners, in that the trust relation between them and the Railway Company

arose on the passage and acceptance of the Act of 1887, and because: "The intervener took no action then to make known or enforce the claim now asserted and allowed more than a quarter of a century to elapse before he presented the claim in a court of equity." This appears in the opinion in Case No. 166, R. 271, which was adopted in the other cases. There are several reasons why this ruling is unsound.

A.

The claimants could in no event have any standing in a court of equity to enforce a trust against the Railway Company until they had established their claims in the Land Department. That mode of procedure was specifically provided for in the Act of 1887. No time was fixed for making application to the Land Department beyond that which may be implied from the recognition in § 2 of their rights while the land "still remained in their possession." In any case it was proper to allow the applications within a reasonable time, and what constituted a reasonable time was a matter for the Land Department to determine. It was so held in the very similar case of a preferential right to purchase under § 5 of the General Adjustment Act of March 3, 1887, 24 Stat. 556; *Ramsey v. Tacoma Land Co.*, 196 U. S. 360, 363. The possession of the land by these claimants had been and is still continuous.

Assuming that upon the final decision of the Land Department awarding the land to the claimants they might then have resorted to a court of equity to estab-

lish their titles, they were not bound to do so. They had the right to rely upon the Government which had assumed in the Act of February 8, 1887, the obligation to protect them "on said lands in all their rights."

24 Stat. 392, § 6. Doubtless they believed that their rights were being protected by the omnibus suit brought by the Government on February 27, 1901, within the limitation period and yet undetermined, but to which the purchasers from the Railway Company were not made parties. They have been in the hands of the Government, where they were invited to place themselves upon the assurance that they would be protected in all their rights, and in the hands of the Government they yet remain. If the Government has been negligent the fault is not chargeable against them, and laches can never be imputed to the Government.

B.

Moreover, after the determination in their favor by the Land Department, the claimants had the right to regard the lands awarded to them as "excepted out of the grant as much as if in a deed it had been excluded from the conveyance by metes and bounds." *Kansas Pac. Ry. Co. v. Dunmeyer*, 113 U. S. 629, 644; *Sioux City &c. Land Co. v. Griffey*, 143 U. S. 32, 40; *Whitney v. Taylor*, 158 U. S. 85, 93; *Weeks v. Bridgeman*, 159 U. S. 541, 545. Because of this they had the right to regard the railroad patents as not purporting to convey such lands, or, as to such lands, that the patents were utterly void and subject to challenge

in an action at law. *Noble v. Union River Logging Co.*, 147 U. S. 165, 174; *Weeks v. Bridgman*, 159 U. S. 541, 547; *Burfenning v. Chicago &c. Ry. Co.*, 163 U. S. 321, 323; *Northern Pacific Railroad v. Colburn*, 164 U. S. 383, 387; *Deweese v. Reinhard*, 165 U. S. 386, 389; *Northern Pacific Railway v. Trodick*, 221 U. S. 208, 215. Hence they would have had a perfect defense at any time against an action of ejectment brought by the present defendants. Laches can not be imputed to one who is in the peaceable possession of land for delay in resorting to a court of equity to establish his title. Rather is laches to be imputed to these defendants who, although claiming to be the absolute owners of the lands for many years took no action to dispossess the claimants. *Ruckman v. Cory*, 129 U. S. 387, 389-390.

It has been suggested that, prior to application to enter, the occupancy and possession of the intervener in case No. 166 was not effective to impart notice beyond the technical quarter section on which his improvements were located. This would not apply to case No. 165, which involves a technical quarter section. Neither does it apply to case No. 164 where the purchases from the Railway Company were after the claimant's application to the land office. See separate statements of cases, *supra*. But the defendants are hardly in a position to urge this objection in any case, since they took no action looking to the assertion of their supposed title to any portion. Had they done so doubtless they would

have received notice of the extent of the claim. Under the practice of the Land Department, of which prospective purchasers from the Company were bound to take notice, the claim might be composed of any four contiguous 40-acre tracts lying in different quarter sections. *St. Paul, Minn. & Man. Ry. v. Donohue*, 210 U. S. 21, 34.

V.

Defense of Bona Fide Purchaser.

The source of title under the patents to the Railway Company was the Act of February 8, 1887. Purchasers from the Company were therefore bound to take notice of the provisions of that Act excepting lands of the character of those here in question and of the subsequent proceedings in the Land Department for which the Act provided and by which the exception of these lands became absolute. *Weeks v. Bridgman*, 159 U. S. 541, 545-547, and cases cited; *Northern Pacific Railway v. Trodick*, 221 U. S. 208, 209, 215. They could not close their eyes to these record facts or the existing occupancy showing an adverse right and still claim to be bona fide purchasers. *Krueger v. United States*, 246 U. S. 69, 78, and cases cited; *Winona &c. Railroad v. United States*, 165 U. S. 483, 485.

The situation is not altered as to one 80-acre tract by the fact that it was purchased from the Railway Company August 3, 1886. See statement in No. 166, *supra*. The purchaser took with notice that the

grant of 1871 was subject to forfeiture and hence subject to all the conditions of confirmation contained in the Act of 1887. In *New Orleans Pacific Railway Company v. United States*, 124 U. S. 124, it was held that the failure of the original grantee to complete the road within five years subjected the assignee to the imposition of new conditions. And in *Atlantic and Pacific Railroad v. Mingus*, 165 U. S. 413, 430, speaking of the rights of mortgagees of a defaulting grantee, the court said:

The mortgagees, standing in the place of the mortgagor, had no greater rights than it had, and must be held to have known that they were taking an estate which was defeasible upon condition broken.

CONCLUSION.

The decrees appealed from should be reversed with directions to enter decrees establishing the title of the United States to the lands in question for the benefit of the interveners, or that the defendant Lumber Companies hold the legal title in trust for the interveners.

Respectfully submitted.

FRANCIS J. KEARFUL,
Assistant Attorney General.

OCTOBER, 1918.

APPENDIX.

DEPARTMENT OF JUSTICE,
November 19, 1915.

SIR: In your letter of August 9, 1913, you referred to a previous request of your department to my predecessor for an opinion relative to a case of indemnity school land selected by the State of Colorado pursuant to the acts of March 3, 1875 (18 Stat. 474), and February 28, 1891 (26 Stat. 796).

The act of 1875 is the Colorado enabling act, section 7 of which provides:

"That sections numbered sixteen and thirty-six in every township, and where such sections have been sold or otherwise disposed of by any act of Congress, other lands, equivalent thereto, in legal subdivisions of not more than one quarter section, and as contiguous as may be, are hereby granted to said State for the support of common schools."

Section 15 of the same act provides:

"That all mineral lands shall be excepted from the operation and grants of this act."

The act of 1891, amending sections 2275 and 2276 of the Revised Statutes, grants indemnity lands in lieu of school sections 16 and 36 lost by any State or Territory by reason of preemption or homestead settlements thereon before survey, or because they are mineral or included within any reservation or have been otherwise disposed of, or where the school sections are wanting by reason of fractional townships or from any natural cause whatever. Provision is made for ascertaining in advance of the surveys the school sections included in reservations, and for selection of all lieu lands by the State or Territory "from any unappropriated, surveyed public lands, not mineral in character, within the State

or Territory where such losses or deficiencies of school sections occur."

There is no provision either in the Colorado grant or in the general act for the issuance of patents or other evidence of ownership of indemnity school lands, nor for any action to be taken by the Land Department for the selection, ascertainment, or identification of such lands.

Under date of January 24, 1900, the State of Colorado filed in your department a list of indemnity school selections, in which was included a tract of 40 acres in lieu of a portion of a section numbered thirty-six of equal area which fell within the Ute Indian Reservation. Thereafter a list was prepared in the General Land Office wherein was entered the above specified selection with others not material to be considered, which list bore the following title:

"Approved list No. 4 of school indemnity lands, exhibiting the tracts of public lands situated in the district of lands subject to sale at Glenwood Springs, Colorado, which have been selected for the support of schools in certain townships and fractional townships where the full amount of school lands to which such townships are entitled have not been granted in place, and which selections are provided for in the acts of Congress approved March 3, 1875 (18 Stat. 474), and February 28, 1891, amending sections 2275 and 2276 of the Revised Statutes (26 Stat. 796)."

Upon this list the Commissioner of the General Land Office made the following certification and recommendation, dated May 21, 1902:

"It is hereby certified that the tracts described in this list are embraced in the original lists now on file in this office of lands selected by the State of Colorado pursuant to the laws of said State, in the Glenwood Springs land district, as indemnity for losses in the sections and townships named, which school land indemnity selections are authorized by the acts of Congress above cited.

"It is further certified that the lands reported lost or deficient in said list and those selected in lieu

thereof, have been examined and compared with the township plats and tract books in this office; that the indemnity lands claimed have been found to be properly due the townships for which they were selected; and that the selected lands are shown to be subject to such selection, being unappropriated surveyed public lands, not mineral in character, within the limits of said State, and free from adverse claims of record.

"It is therefore recommended that the said list embracing twenty-five thousand five hundred and twenty-one acres, and twenty-six hundredths of an acre, be approved subject to any valid interfering rights existing at date of selection."

To this was added the approval of the Secretary of the Interior, dated June 14, 1902, as follows:

"The foregoing list of selections, embracing twenty-five thousand five hundred and twenty-one acres and twenty-six hundredths of an acre, is hereby approved, subject to any valid interfering rights existing at date of selection."

A copy of this list, with the foregoing certification and approval, was sent by the commissioner to the governor of Colorado with the following letter of transmittal, dated July 14, 1902:

"I have the honor to transmit, herewith, duly certified copy of approved list No. 4, containing 25,521.26 acres of indemnity school land selections made in the Glenwood Springs land district, the selection of which was approved June 14, 1902."

Thereafter special agents of the General Land Office made an inspection of a portion of the lands embraced in the certified list, including the 40-acre tract above specified, and reported:

"That the lands were known to be coal land at the time of the approval to the State; that coal was actually mined and shipped from said land, and that it, in fact, outcrops 10 feet in thickness upon the surface of the land, which outcrop is plainly visible for a great distance."

Thereupon the commissioner recommended that a hearing be ordered, at which the State of Colorado and any persons claiming under it should be cited to appear, for the purpose of determining whether the tract in question was known coal land at the time of the approval and certification, in order that the department, if the facts should justify, might correct the erroneous approval and certification by a cancellation thereof.

In this situation an opinion is desired upon the following questions:

1. Does the certification of land to a State or Territory divest the Interior Department of jurisdiction to determine the known character of the land at the date of certification where it is alleged that the land was not of the character contemplated by the act making the grant to the State or Territory?

2. In the event such certification does not divest the department of jurisdiction, may the department, upon its determination that the land was known mineral at and prior to the date of certification, treat the certification as null and void and make other disposition of the land?

3. If the jurisdiction of the department is not lost by such certification, can such jurisdiction be exercised after the lapse of the limitation period prescribed in the act of March 3, 1891?

4. If the department is without authority to determine the foregoing questions, and proceedings must be instituted in the courts for that purpose, do the statutes of limitation mentioned apply to such certifications?

The principal question for consideration is whether title to all of the lands embraced in the list passed to the State notwithstanding one tract therein was known coal land. Coal lands are mineral lands within the meaning of the exception in the grant, but the exception is confined to mineral lands which were known to be such at the time of the selection by the State. (*Mullan v. United States*, 118 U. S. 271, 277, 278; *McCreery v. Haskell*, 119 U. S. 327, 331; *Durand v. Martin*, 120 U. S. 366, 370; *Olive*

Land, etc., Co. v. Olmstead, 103 Fed. 568, 576.) Although the words of the grant are *in praesenti*, they could not operate to convey title to indemnity selections without definite ascertainment by some authorized action of the Land Department. (*Frasher v. O'Connor*, 115 U. S. 102, 104, 106; *Johanson v. Washington*, 190 U. S. 179, 182; *Humbird v. Avery*, 195 U. S. 480, 507; *Burke v. Southern Pacific R. Co.*, 234 U. S. 669, 685.)

The practice of passing title by certification of the commissioner is authorized by the act of August 3, 1854 (10 Stat. 346), reenacted without substantial change as section 2449 of the Revised Statutes, which reads as follows:

"Where lands have been or may hereafter be granted by any law of Congress to any one of the several States and Territories, and where such law does not convey the fee-simple title of the lands, or require patents to be issued therefor, the list of such lands which have been or may hereafter be certified by the Commissioner of the General Land Office, under the seal of his office, either as originals or copies of the originals or records shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such act of Congress, and intended to be granted thereby; but where lands embraced in such lists are not of the character embraced by such acts of Congress, and are not intended to be granted thereby, the lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim or interest shall be conveyed thereby."

Inasmuch as the granting acts under consideration did not convey the title of indemnity school lands and did not require patents to be issued therefor, the commissioner's certificate in this case was authorized and its effect is governed by this section of the Revised Statutes. But the list under consideration also bears the approval of the Secretary of the Interior. That fact leads me to observe that this statute does not say

that certification by the commissioner shall be the exclusive method of passing title, but only says that his certification shall have that effect, where title is not conveyed or patents required by the grant. It is therefore pertinent to inquire whether there is any law authorizing the transfer of title in such cases by approval of the Secretary. If the grant in this case had authorized the selection of indemnity school lands "subject to approval by the Secretary of the Interior," as in a similar grant to California (act of Mar. 3, 1853, sec. 7; 10 Stat. 247), or "with the approval of the Secretary of the Interior," as in the grant to the Dakotas, Montana, and Washington (act of Feb. 22, 1889, sec. 10; 25 Stat. 679), I should be constrained to hold that the approval of the Secretary passed the title without regard to the commissioner's certificate and unaffected by section 2449 of the Revised Statutes. (*Mullan v. United States*, 118 U. S. 271, 273, 278; *Johanson v. Washington*, 190 U. S. 179, 184.) But there is nothing of the kind. The original grant to Colorado (sec. 7 of the act of Mar. 3, 1875, 18 Stat. 475) does not in any manner provide for selection of indemnity school lands, and the act of February 28, 1891 (26 Stat. 796) only provides that they "may be selected by said State." This failure of the original grant to provide a method for passing title of indemnity school lands is accentuated by the fact that in other portions of the same act other grants were made of lands to be selected, and such a method was provided. Section 8 (18 Stat. 475) grants to the State 50 sections for public buildings, "to be selected and located by direction of the legislature thereof, and with the approval of the President." Section 9 grants 50 other sections for a penitentiary, "to be selected and located and with the approval as aforesaid." And section 10 provides for setting apart 72 other sections "for the use and support of a State university, to be selected and approved in the manner as aforesaid." The use in sections 8, 9, and 10 of language appropriate to invest the President with authority to pass the title to lands to be selected for

the benefit of certain public institutions suggests that the omission of similar language in section 7 with reference to indemnity school lands was intentional. Congress evidently thought that, in the absence of specific reference in the grant, authority already given to the Land Department would suffice to convey the title. "It is not necessary that with each grant there shall go a direction that its administration shall be under the authority of the Land Department. It falls there unless there is express direction to the contrary." (*Bishop of Nesqually v. Gibbon*, 158 U. S. 155, 167.) In the absence of a prescribed method for passing title, approval by the Secretary of a list of indemnity lands granted by Congress would have that effect. "Unless Congress clearly designates some other officer to act in respect to such matters it will be assumed that he is the officer to represent the Government." (*Johanson v. Washington*, 190 U. S. 179, 185.) But in this case Congress had, by the act of August 3, 1854 (10 Stat. 346; R. S. 2449), designated another officer, namely, the commissioner; it had specifically directed the method by which he should pass the title, that is, by certification of lists; and it had prescribed in plain and emphatic language the effect to be given to such certification. It can not, therefore, be held that Congress intended by omission to authorize the Secretary, by a different method, to accomplish a different result.

Congress has also indicated its understanding to be that the method prescribed by the act of August 3, 1854 (R. S. sec. 2449), was the sole method of passing title in this kind of a case. The original grant of 1875 to Colorado (18 Stat. 475) was of indemnity lands in lieu of sections 16 and 36 "where such sections have been sold or otherwise disposed of by any act of Congress." The act of April 2, 1884 (23 Stat. 10), provides that the prior act "shall be construed as giving to the State of Colorado the right to select for school purposes other lands in lieu of such sixteenth and thirty-sixth section as may have been or shall be

found to be mineral lands," and specifically authorizes the Secretary of the Interior to certify to the nonmineral character of the lands so selected and thereby to pass the title thereof as nonmineral lands. If it had been understood that the Secretary already had authority to transfer title by approval of lists, regardless of section 2449, this specific grant of authority would have been superfluous. And if, understanding the contrary, it had been intended to grant such authority in any case other than that specifically dealt with, such intention would naturally have been expressed.

The act of May 20, 1826 (4 Stat. 179), provided generally for the passage of title to indemnity school lands for losses in fractional townships, by means of selections to be made by the Secretary of the Treasury, who then had supervisory jurisdiction over the Land Department. By the act of March 3, 1849 (9 Stat. 395), the Interior Department was created, and the powers of the Secretary of the Treasury with respect to public lands were transferred to the Secretary of the Interior. The act of February 26, 1859 (11 Stat. 385), extended the grant of indemnity school lands so as to cover cases of school sections lost through pre-emption before survey, and provided for selections in accordance with the provisions of the act of May 20, 1826. Under the act of 1859 titles to indemnity school selections were subject to be transferred by action of the Secretary of the Interior as successor to the Secretary of the Treasury. (*Johanson v. Washington*, 190 U. S. 179, 185.) In this situation the Revised Statutes were enacted, and the provisions of the prior acts were carried forward into sections 2275 and 2276, but with a notable exception; all provisions for the method of selection and the passage of title were omitted. By omitting those provisions they were repealed. (R. S. sec. 5596.) Subsequently, by the act of February 28, 1891 (26 Stat. 796), these sections were amended so as to extend indemnity grants to cover the cases of school sections lost by any State or Territory, because they were mineral lands, or

within a reservation or had been otherwise disposed of, and provided that such indemnity lands "may be selected by said State or Territory." Nothing was said about the passage of title through any action of the Land Department. The omission from sections 2275 and 2276 of the special provisions for passing title, contained in the prior acts from which those sections were taken, and the subsequent amendment in 1891 without any such provision, can not be understood otherwise than as a declaration that section 2449 of the Revised Statutes, providing for certification of lists by the commissioner, should be the only method of passing title in this class of cases.

With reference to the effect of the certification, I perceive that it is not a case simply of authority given to the Land Department to convey title of nonmineral public land. If that were all, a departmental conveyance of public land as nonmineral would involve a final determination that all of the land embraced in the conveyance is of that character, so that the title thereof would pass from the United States, and jurisdiction to correct an erroneous determination would pass from the department and become vested in the courts. But the intention of Congress, expressed in section 2449 of the Revised Statutes, to withhold jurisdiction to determine by certification the character of the land, is both plain and emphatic and such as to leave no room for controversy.

It can not be said that incidental jurisdiction to determine that mineral land is nonmineral has been conferred by a law which declares that the act involving such a determination "shall be perfectly null and void" and that "no right, title, claim, or interest shall be conveyed thereby." To give the act of certification in this case the effect of passing title to mineral land would be to disregard and defy that provision. "The action of the Land Department can not override the expressed will of Congress, or convey away public lands in disregard or defiance thereof."

(*Burfenning v. Chicago, etc., Ry. Co.*, 163 U. S. 321, 323; *Beley v. Naphtaly*, 169 U. S. 353, 356.)

The certification may be said to have the force and effect of a patent, because it is an authorized method of conveying title. But whatever efficacy to convey title is possessed by the certification is derived from section 2449 of the Revised Statutes. By that law it conveyed title to lands embraced in the list "that are of the character contemplated by" the granting acts "and intended to be granted thereby." Those acts excepted from their operation all mineral lands. And the final clause of section 2449 declares that the list, "so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby." A certification by the commissioner to lands not open to selection "would not pass title out of the United States because he has no authority in law to make such a certificate." (*Durand v. Martin*, 120 U. S. 366, 370.) Such action "is not merely irregular but absolutely void, and may be shown to be so in any collateral proceeding." (*Noble v. Union River Logging Railroad*, 147 U. S. 165, 174.) As to such lands, "the certification had no operative effect." (*Weeks v. Bridgman*, 159 U. S. 541, 547.)

The certified list must therefore be taken, by force of the law upon which it is founded, as reserving mineral land. It is thus seen to be precisely analogous to a congressional grant of designated lands in place accompanied by a reservation of land of a specified character. (*Mining Co. v. Consolidated Mining Co.*, 102 U. S. 167, 175; *Garrard v. Silver Peak Mines*, 82 Fed. 578, 588; 94 Fed. 983, 984.) In such a case the reserved land is "excepted out of the grant as much as if in a deed it had been excluded from the conveyance by metes and bounds." (*Kansas Pacific Ry. Co v. Dunmeyer*, 113 U. S. 629, 644; *Sioux City, etc., Land Co. v. Griffey*, 143 U. S. 32, 40; *Whitney v. Taylor*, 158 U. S. 85, 93; *Weeks v. Bridgman*, 159 U. S. 541, 545.)

The view expressed by Acting Attorney General Phillips in 17 Opinions, 406, 408, to the effect that a certification under section 2449 of the Revised Statutes divests the department of jurisdiction over lands required by the grant to be excepted, was not necessary to a disposition of the matter before him. The case then under consideration was, like that involved in *Mullan v. United States*, 118 U. S. 271, 273, 274, the case of an approval by the Secretary of the Interior of a list of selections under section 7 of the California grant of March 3, 1853 (10 Stat. 247), which specifically authorized such selections "subject to approval by the Secretary of the Interior." That provision prescribed the method of passing title and invested the Secretary with incidental jurisdiction to determine the character of all the land embraced in the list, unrestrained by section 2449.

In *Burke v. Southern Pacific R. Co.*, 234 U. S. 669, 705-709, it was held that an exception of mineral land in a patent was ineffectual to reserve such land, because the statute requiring the patent did not authorize the exception. Hence it was held that the patent evidenced a precedent determination by the Land Department that all the lands embraced in the patent were nonmineral in character. In the case now under consideration, the exception of mineral lands from the certified list was required and jurisdiction to determine the character of the lands by certification was withheld.

The statement in *Mullan v. United States*, 118 U. S. 271, 279, and in *Noble v. Union River Logging Railroad*, 147 U. S. 165, 176, quoting from *United States v. Stone*, 2 Wall. 525, 535, that "one officer of the land office is not competent to cancel or annul the act of his predecessor," is without any real significance here. Where the title has passed by the authorized act of a land officer, neither he nor his successor can revoke the act and reassume jurisdiction over the land; but where the act in question does not pass the title, neither he nor his successor

has lost any jurisdiction over the land which pertains to the office. (*Beley v. Naphtaly*, 169 U. S. 353, 364.)

The result is that, as to coal land embraced in the certified list under consideration, and known to be such at the time of the selection, the title thereto remains in the United States, subject to the control and disposition of the Land Department.

This disposes of the first and second questions propounded.

The third question is whether the jurisdiction of your Department over the excepted land can be exercised after the lapse of the limitation period prescribed in the act of March 3, 1891. Section 8 of that act provides (26 Stat. 1099):

"That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patent."

The certification in question is an authorized method of conveying title and therefore may be said to have the force and effect of a patent. But it is so authorized and has such force and effect only by virtue of the statute upon which it is founded. Without the statute it is unauthorized and has no force or effect whatever. Read, as the certification must be in order to have any force or effect, in connection with section 2449 of the Revised Statutes, mineral lands which were known to be such at the time of the selection by the State, are excepted from its operation. As to such lands, the certification, under the statute, does not purport to convey any title. Hence, even though the limitation statute should be held to bar a suit by the United States to cancel or annul a certification or to confirm the title which it purports to convey, as to which no opinion is expressed (see *United States v. Chandler-Dunbar Co.*, 209 U. S. 447, 450; *Shaw v. Kellogg*, 170 U. S. 312, 341; *United States v. Winona, etc., R. Co.*, 165 U. S. 463, 476;

Louisiana v. Garfield, 211 U. S. 70, 77), nevertheless lands excepted from its operation are not thereby affected.

The third question therefore is answered in the affirmative.

The foregoing renders unnecessary an answer to the fourth and last question.

Very respectfully,

T. W. GREGORY.

To the SECRETARY OF THE INTERIOR.



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UNITED STATES OF AMERICA.

THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, Complainant,
and JOSEPHINE BROWN, Intervening Complainant,

Appellants,

vs.

NEW ORLEANS PACIFIC RAILWAY COMPANY, W. R. PICKERING LUMBER COMPANY, and RIVER LAND & LUMBER COMPANY,
Defendants and Appellees.

} IN EQUITY.
October Term, 1918.

No. 164.

UNITED STATES, Complainant,
and WILLIAM R. TURNER, Intervening Complainant,

Appellants,

vs.

NEW ORLEANS PACIFIC RAILWAY COMPANY, W. R. PICKERING LUMBER COMPANY,
Defendants and Appellees.

} IN EQUITY.
October Term, 1918.

No. 165.

BRIEF FOR DEFENDANTS W. R. PICKERING
LUMBER COMPANY AND RIVER LAND
& LUMBER COMPANY.

I.

These two cases involve "indemnity lands". The legal principles in each case are substantially the same and the facts vary so little that they are briefed together.

II.

The bill in No. 164 was filed by the United States January 21, 1915 (R. 16), to cancel and annul its land patents issued March 3, 1885, and August 8, 1889, or, if cancellation is refused, to have the defendant lumber companies, the present holders of the patent title, declared to be trustees for the intervening appellant Brown and to compel conveyance to her.

The bill in No. 165 was filed by the United States on the same day (R. 12), to cancel and annul its land patent issued March 3, 1885, or, if cancellation is refused, to have the appellee W. R. Pickering Lumber Company, the present holder of the patent title, declared to be trustee for the intervening appellant Turner and to compel conveyance to him.

After the bill in No. 164 had been filed, and on April 2, 1915 (R. 50), Brown intervened and prayed that the appellee lumber companies be declared trustees for and compelled to convey to her.

After the bill in No. 165 had been filed, and on April 22, 1915, Turner intervened and prayed that the appellee lumber company be declared trustee for and compelled to convey to him.

The ground on which appellants ask this relief is that the patents were *erroneously issued*. They allege the lands involved were, by Section 2 of the Act of February 8, 1887 (24 Stat. 391), excepted from the grant and that the intervenors in each case, who had entered into possession of a portion of the premises involved prior to the

passage of said Act and years later had attempted to make homestead entry thereof, were entitled to the same as against the Government and the appellees.

It is claimed in No. 164 that Jasper J. Brown, deceased husband of intervenor, settled on the premises involved in April, 1881, and attempted to make homestead entry thereof August 10, 1888; that Turner, intervenor in No. 165, took possession in 1872 and attempted to make homestead entry December 14, 1896.

No fraud is alleged or attempted to be proved. There were decrees in the District Court for defendants. In No. 164 June 1, 1915 (R. 287-289), and in No. 165 on the same day. (R. 145, 146.) By the decrees the defendants' titles were quieted. Complainant and intervenors appealed. The Court of Appeals affirmed the decrees October 3, 1916, and denied rehearing November 4, 1916 (149 C. C. A. 153).

III.

The appellees contend:

1. That the Government has no right to the lands involved for itself and therefore no right to sue, because—

A.

It was barred by its statute of limitations.

B.

It was barred by congressional confirmation to good faith purchasers.

C.

It was barred as to five out of the eight forties involved by the provisions of Section 6 of the Act of February 8, 1887.

2. That the Government had no duty to perform toward the alleged settlers, the intervenors, and therefore no right to sue on their behalf, because—

A.

The intervenors had not complied with the law in attaching their claims prior to Railroad selection, approval and patenting.

B.

The settlers, intervenors, had no bona fide intent to homestead the land at any time prior to the Railroad selections, approvals and patents.

C.

The Government in patenting the lands to the Railroad Company had itself asserted and enforced the settlers' lack of rights.

3. That the settlers had no rights for the reasons last above given and for the additional reason that they had been guilty of laches.

4. That the Government, being barred by its statute of limitations, the intervening alleged settlers, being claimants under the Government, are equally barred.

5. That the error charged is that the lands were excepted from the grant by Section 2 of the Act of February 8, 1887; that said section has no application to the lands in controversy, and the error charged not being apparent, the whole case falls.

6. That under the original grant the Railroad rights were prior in time and therefore in right.

IV.

At the time of making this brief, counsel for the ap-

pellees have not received appellants' brief. We therefore briefly set out the facts, stated in chronological order.

FACTS IN NO. 164.

Prior to 1871, the lands involved were surveyed "public" lands open to entry. A land office at which entry could be made existed and was open from 1871 down to the present time (R. 78).

March 3, 1871, by Section 22 of the Act of that date (16 U. S. Stat. 537), Congress made a land grant to the New Orleans, Baton Rouge & Vicksburg Railroad Company, a Louisiana corporation organized to build a railroad east of the Mississippi from New Orleans to Baton Rouge, thence west of the River via Alexandria to a connection with the Texas Pacific at Shreveport. We quote this grant:

"That the New Orleans, Baton Rouge and Vicksburg Railroad Company, chartered by the State of Louisiana, shall have the right to connect by the most eligible route to be selected by said company with the said Texas Pacific Railroad at its eastern terminus, and shall have the right-of-way through the public land to the same extent granted hereby to the said Texas Pacific Railroad Company; and in aid of its construction from New Orleans to Baton Rouge, thence by the way of Alexandria, in said State, to connect with the said Texas Pacific Railroad Company at its eastern terminus, there is hereby granted to said company, its successors and assigns, the same number of alternate sections of public lands per mile, in the State of Louisiana, as are by this act granted in the State of California, to said Texas Pacific Railroad Company; and said lands shall be withdrawn from market, selected, and patents issued therefor, and opened for settlement and preemption, upon the same terms and in the same manner and time as is provided for and required from said Texas Pacific Railroad Company, within said State of California; Provided, That said

company shall complete the whole of said road within five years from the passage of this act."

We also quote prior sections of the same act referred to in Section 22:

"See. 9. That for the purpose of aiding in the construction of the railroad and telegraph line herein provided for, there is hereby granted to the said Texas Pacific Railroad Company, its successors and assigns, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as such line may be adopted by said company, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad in California, *where the same shall not have been sold, reserved, or otherwise disposed of by the United States, and to which a preemption or homestead claim may not have ATTACHED* at the time the line of said road is definitely fixed. In case any of the said lands shall have been sold, reserved, occupied, or preempted, or otherwise disposed of, other lands shall be selected in lieu thereof by said company, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections first above named, and not including the reserved numbers. If, in the too near approach of the said railroad line to the boundary of Mexico, the number of sections of land to which the company is entitled cannot be selected immediately on the line of said railroad, or in lieu of mineral lands excluded from this grant, a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections nearest the line of said railroad may be selected as above provided; and the word "mineral", where it occurs in this act, shall not be held to include iron or coal: Provided, however, That no public lands are hereby granted within the State of California further than twenty miles on each side of said road, except to make up deficiencies as aforesaid, and then not to exceed twenty miles from the lands originally granted. The term "Ship's channel", as used in

this bill, shall not be construed as conveying any greater right to said company to the water front of San Diego bay than it may acquire by gift, grant, purchase, or otherwise, except the right-of-way, as herein granted: And further provided, That all such lands, so granted by this section to said company, which shall not be sold, or otherwise disposed of, as provided in this act, within three years after the completion of the entire road, shall be subject to settlement and preemption like other lands, at a price to be fixed by and paid to said company, not exceeding an average of two dollars and fifty cents per acre for all the lands herein granted."

"Sec. 12. That whenever the said company shall complete the first and each succeeding section of twenty consecutive miles of said railroad and put it in running order as a first-class road in all its appointments, it shall be the duty of the Secretary of the Interior to cause patents to be issued conveying to said company the number of sections of land opposite to and coterminous with said completed road to which it shall be entitled for each section so completed. Said company, within two years after the passage of this act, shall designate the general route of its said road, as near as may be, and shall file a map of the same in the Department of the Interior; and when the map is so filed, the Secretary of the Interior, immediately thereafter, shall cause the lands within forty miles on each side of said designated route within the Territories, and twenty miles within the State of California, to be withdrawn from preemption, private entry and sale; Provided, however, That the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled, 'An Act to secure homesteads to actual settlers on the public domain', approved May twenty, eighteen hundred and sixty-two, and the amendments thereto, shall be, and the same are hereby, extended to all other lands of the United States on the line of said road when surveyed, except those hereby granted to said company."

The grant was accepted by the grantee, and November 11, 1871, the Railroad Company filed its general route map as required by the grant (R. 83). The same was accepted by the Secretary of the Interior (R. 83). This was the only map required to be filed (16 U. S. Stat. 573, §12), and thereby the railroad was definitely located (Mo., Kans. & Tex. vs. Cook, 163 U. S. 491).

November 29, 1871, the Secretary of the Interior withdrew from "preemption, private entry and sale" both the "place" and "indemnity" lands. This order of withdrawal was filed in the local land office December 20, 1871 (R. 84).

Following this came the Act of May 14, 1880, providing that homestead entries, if the entry were made within thirty days after taking possession, should date from the original taking of possession (21 Stat. 141).

January 5, 1881, the New Orleans, Baton Rouge & Vicksburg Railroad Company assigned its rights and property under the grant to the New Orleans Pacific Railroad Company by deed (R. 77).

The road opposite to the premises in question was built in 1881-1882 by the New Orleans Pacific Railroad Company (R. 108, 117).

In April, 1881, Jasper J. Brown made a settlement on the Northwest quarter of the Northeast quarter of Section 13, in Township 2 North of Range 7 West, Louisiana, and built thereon a small house. Subsequently he cleared around the house a field of about $35\frac{1}{2}$ acres lying in the Northwest quarter of the Northeast quarter and the Northeast quarter of the Northeast quarter of said Section 13. It is claimed that prior to the building of his house he girdled a few trees on the Northeast quarter of the Northwest quarter, covering an area of about $\frac{1}{16}$ of an acre (map). This was immediately adjoining the place and clearing upon which Jasper J. Brown lived

before he moved onto the Northwest quarter of the Northeast quarter (R. 195). There is no showing whatever of any occupation of this 1/16 acre other than the girdling aforesaid, which was in 1880 (R. 195).

November 17, 1882, there was filed in the land office a map of the road showing its actual construction. This was the map filed with the Commissioner who inspected the road and certified its construction to the President. Although the definite location of the road had been determined by the map of 1871, the Land Office insisted that the road had not been definitely located except by the map of 1882, and that map is styled "definite location" map in the statute of February 8, 1887 (R. 108, Senate Ex. Doc. No. 31, 1st Sess. 48th Cong. pp. 77-82).

April 17, 1883, Railroad mortgaged to Dillon, et al (R. 32, 80).

December 29, 1883, the Railroad Company selected the premises in question as "indemnity" lands (R. 80).

January 5, 1884, Railroad made supplemental mortgage to Dillon, et al (R. 32, 80).

March 3, 1885, such selections were approved as to the Southwest quarter of the Northeast quarter of Section 13, and on the same day that description was patented to the New Orleans Pacific Railroad Company (R. 80).

On February 8, 1887, the Act of Congress was passed out of which this controversy has arisen (24 Stat. 391).

March 3, 1887, the Railroad Adjustment Act requiring railroad grants to be adjusted in accordance with the decisions of this Court (24 Stat. 556).

April 20, 1887, the Act of February 8, 1887, was accepted by the Railroad Company, and under the provisions of Section 2 thereof, took effect (R. 230).

August 15, 1887, the withdrawal of the "indemnity" lands under this grant was revoked by the Secretary of

the Interior (R. 84); for the reason that the Railroad had then made selection of all lands subject thereto (6 L. D. 77). This revocation did not affect prior selections approved or unapproved (6 L. D. 91, 9 L. D. 74, 219 U. S. 392).

July 14, 1888, the Railroad selections of the Northeast quarter of the Northwest quarter and the North half of the Northeast quarter of Section 13, were approved (R. 80).

August 10, 1888, Jasper Brown filed homestead entry of the lands in controversy in the local land office. This brought on a contest between the Railroad Company and Brown, which was, on October 12, 1888, decided by the Register and Receiver in favor of Brown (R. 233-270).

December 5, 1888, the Railroad Company appealed (R. 262).

August 8, 1889, patent issued to the Railroad Company for the Northeast quarter of the Northwest quarter and the North half of the Northeast quarter (R. 80).

June 13, 1890, the Railroad Company sold and conveyed to one Brewster the Northeast quarter of the Northwest quarter (R. 41, 80).

March 3, 1891, the first statute of limitations relative to the United States land patents (26 Stat. 1093).

December 1, 1891, contest in the general land office was determined in favor of Brown (R. 291).

August 3, 1892, the Railroad Company entered into an agreement with the Government by which it agreed to dismiss all its appeals then pending, to submit to the decisions of the land office in contests with settlers, and where it had sold any of the granted lands which were afterwards determined to have been erroneously patented, that it would reacquire that title and convey it to the Government (R. 231). This agreement was never

recorded. January 19, 1893, the land office requested a reconveyance of these lands (R. 269).

March 2, 1896, the second statute of limitations as to railroad patents (29 Stat. 42).

April 10, 1900, Brewster sold to C. L. Pack the Northeast quarter of the Northwest quarter (R. 41, 80).

June 8, 1900, the railroad reconveyed to the Government upwards of 5,000 acres of land, but not including these.

June 28, 1900, the railroad sold to Kisatchie Land Company the Southwest quarter of the Northeast quarter and the North half of the Northeast quarter (R. 32, 80). This was a sale on foreclosure of the mortgages given by the Railroad Company in 1883-4 prior to August 3, 1892, the date of its agreement to reconvey.

February 27, 1901, Suit No. 16 was filed in the Circuit Court of the United States for the Western District of Louisiana, which sought to cancel the patent to the lands in question here, but the then holders of the railroad title were not parties to the suit. No *lis pendens* was ever filed in this case, and no legal service of process upon Railroad was made till 1904 (R. 271-276).

April 23, 1901, the two descriptions last given were sold and conveyed to Florien Giaque (R. 32, 80).

August 17, 1903, Giaque sold and conveyed to Shearer the two descriptions last given (R. 33, 80).

August 20, 1903, Shearer sold and conveyed to Pickering Lumber Company, the present defendant, the last two descriptions (R. 33, 80).

November 24, 1903, Brewster sold and conveyed to G. R. Nicholson the Northeast quarter of the Northwest quarter (R. 41, 80).

August 8, 1905, Nicholson sold and conveyed to C. L. Pack (R. 41, 80).

July 27, 1909, C. L. Pack sold and conveyed to E. B. Greene (R. 42, 80).

July 27, 1909, E. B. Greene sold and conveyed to River Land & Lumber Company (R. 42, 80).

January 21, 1915, this suit was begun (R. 16).

The dates for the TURNER CASE, NO. 165, are the same except as follows:

Turner took possession in 1872, cleared six acres, and some twelve or thirteen acres more by 1881 (R. 97, map).

He states that in 1872, it was his intention to make it his home; that he "thought he had plenty of time to homestead it when he got ready." (R. 99.)

March 3, 1885, the entire land involved in the Turner case was approved on selection and patented (R. 54).

April 1, 1889, the entire of the Turner land was sold and conveyed by the Railroad to S. H. Mallory (R. 27, 55).

December 14, 1896, Turner filed homestead entry (R. 106-130). In the contest proceedings which subsequently occurred between Turner and the Railroad Company and to which Mallory was not a party, Turner claims to have settled this land in 1872 (R. 119); that his reason for not previously applying for homestead lands was because he thought things would always remain as they were and he could continue to remain upon the land. "I mean that no one would interrupt my staying on the land where I was; I thought things would continue to be as they were. I have always intended to make this tract in contest my home, but did not intend it when I settled it as lands were free then to anybody and no one interrupted a person." (R. 119, 120.)

April 16, 1898, S. H. Mallory sold the land to one Fisher (R. 27, 55).

August 10, 1898, the land office decided in favor of Turner's entry and requested a reconveyance (R. 126).

August 18, 1899, the United States was advised of the sale to Mallory (R. 128).

August 15, 1902, the land was sold by Fisher to the Pickering Lumber Company (R. 27, 55).

January 21, 1915, this suit was begun (R. 12).

V.

ARGUMENT.

A.

The United States had no right to bring this suit.

It has no interest in the land; no fraud is alleged or proved; it is under no obligation to any individual to make his title good, nor does its duty to the public require this action. In the absence of these elements the Government has no right to sue.

U. S. vs. San Jacinto Tin Co., et al, 125 U. S. 273,

U. S. vs. Lamm, 149 Fed. 583,

Lynch vs. U. S., 13 Okla. 146,

S. C. 73 Pac. 1097,

U. S. vs. Stinson, 197 U. S. 204.

The Government has no possible interest in the land involved. It patented this land to the New Orleans Pacific Railroad Company March 3, 1885, and August 8, 1889. This suit was begun January 21, 1915. There is alleged and proved no concealed fraud which would stop the running of the statute of limitations as in the case of Exploration Company vs. U. S., *U. S. Sup. Ct. Adv.* 16, p. 695. The United States had, therefore, lost all interest in the lands by reason of the Act of March 2, 1896 (29 Stat. 42).

Winona vs. U. S., 165 U. S. 463,

U. S. vs. S. P., 184 U. S. 49,

S. P. vs. U. S., 228 U. S. 618,

Burke vs. S. P., 234 U. S. 693,
 U. S. vs. S. P., 157 Fed. 96, 100,
 U. S. vs. C. M. & St. P., 195 U. S. 524,
 U. S. vs. St. P., M. & M., 225 Fed. 27,
 U. S. vs. O. & C. R. R., 186 Fed. 861,
 Iatt vs. Faircloth, 61 So. Rep. 866,
 S. C. 132 La. 906,
 Bodeaw vs. Bonnette, 65 S. Rep. 493,
 S. C. 135 La. 369,
 U. S. vs. Chandler, 209 U. S. 447.

B.

The Act of March 2, 1896 (29 Stat. 42), provided that—

“No patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right of such purchaser is hereby confirmed.”

The Court below, by its decree, found the defendants to be good faith purchasers within the meaning of this act, for it decreed confirmation of the patent title. This finding of the Court is sustained by the evidence. It clearly appears that the defendants bought, expecting to obtain a good title, paid value therefor, and were without notice of any superior rights, for there were no such rights (No. 164, R. 80, 81, 129-188).

So far as the lands claimed by the River Land & Lumber Company are concerned, it bought in July 1909; it appears that the intervenor left the premises in 1904, eleven years before this suit was begun (R. 197), and that there was no cultivation after 1908 (R. 222, 223, 224). There is no showing of any occupation whatever in 1909.

C.

Five forties out of the eight involved in these two suits, namely, all of the lands involved in No. 165 and the Southwest quarter of the Northeast quarter of Section 13 in-

volved in No. 164, were patented to the Railroad Company March 3, 1885, prior to the Act of February 8, 1887. These patents were confirmed by Section 6 of the Act of February 8, 1887 (24 Stat. 391), subject to the rights of settlers under the other sections of the Act. The only other section of the Act applicable to the lands in question is Section 4, which gave the settler the right to buy the lands of the Railroad Company for \$2.00 an acre, a right which was never attempted to be exercised by either of the parties here complaining.

VI.

The Government had no duty to perform toward the settler which would authorize the filing of these bills.

In neither case had the alleged settler so far complied with the laws of the United States as to "*attach*" a homestead claim to the lands in question prior to the selections, and their approval.

The Act of March 3, 1871 (16 U. S. Stat. 573), by Section 22 of which the grant to the Railroad Company was made, was of lands of the United States "not sold, reserved, or otherwise disposed of by the United States and to which a preemption or homestead claim may not have *attached* at the time the line of said road is definitely fixed." (Sec. 9.)

Section 9 of the Act provides that in case any of the "place" lands "shall have been sold, reserved, occupied or preempted or otherwise disposed of, *other lands* shall be selected in lieu thereof."

There was no limit upon these lieu selections save the implied one that at the time of selection the United States should not be under obligation to convey the land selected to third parties. At the time of the enactment of the granting act of March 3, 1871, a homestead claim could

only "attach" to the land by the filing of a homestead entry in the proper land office.

Kan. Pac. vs. Dunmeyer, 113 U. S. 629,
S. C. Land Co. vs. Griffey, 143 U. S. 40,
Lounsdale vs. Daniels, 100 U. S. 113, 116,
Whitney vs. Taylor, 158 U. S. 85,
No. Pac. vs. Colburn, 164 U. S. 383,
Tarpey vs. Madsen, 178 U. S. 215,
Campbell vs. Wade, 132 U. S. 34,
Johnson vs. Drew, 171 U. S. 93,
Higgins vs. State Univ., 94 Ala. 380,
Emblen vs. Lincoln, 161 U. S. 52.

This Railroad grant was a contract between the United States and the grantee which could not be altered without the consent of the grantee. It necessarily follows that in order to render the settler's rights superior to those of the railroad company, the settler's rights must have "attached" by the filing of a homestead claim in the proper office before the selections by the Railroad Company. In neither case was this done. In Case No. 164 the selections of the Railroad Company were made December 29, 1883. The Southwest quarter of the Northeast quarter of Section 13 was approved and patented March 3, 1885. The selection of the other three forties involved in Case No. 164 was approved July 14, 1888, and patent issued August 8, 1889. The attempted homestead entry of the intervenor's husband, Jasper J. Brown, was not filed until August 10, 1888, nearly five years after the selections and 27 days after they had been approved. One forty of the lands had been patented $3\frac{1}{2}$ years before. In No. 165 the Railroad selections were made December 29, 1883, and approved and the lands patented March 3, 1885; the land was sold to third parties April 1, 1889, and the claimant undertook to make homestead entry December 14, 1896. It is, therefore, apparent that

no homestead claim had "attached" to these lands at any time prior to the approval of the Railroad selections. It was then as a matter of law too late to attach a homestead entry. The lands were no longer open to such entry.

Weyerhauser vs. Hoyt, 219 U. S. 380,
 N. P. vs. Wass, 219 U. S. 427,
 N. P. vs. Houston, 231 U. S. 181.

It is claimed that by reason of the Act of May 14, 1880 (21 Stat. 141), the right of the claimants herein dates from the date of their respective settlements and not from the dates of the filing of their homestead entries, and that, therefore, their rights antedate the railroad selections and, being prior in time, are superior in right.

Section 3 of the Act referred to is as follows:

"That any settler who has settled or who shall hereafter settle on any of the public lands of the United States . . . with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States Land Office as is now allowed to settlers under the preemption laws to put their claims on record, and his right shall relate back to the date of settlement the same as if he settled under the preemption laws."

As we have noted above, the granting act of March 3, 1871, was a contract as well as a law. The original act should, therefore, be construed as it would have been at the date of its passage, and subsequent laws claiming to have the effect of altering the terms of the grant should not be held to change the terms of the original contract unless consented to by the other contracting party.

That a law is to be construed as of the date of its passage, see

Platte vs. Union Pacific Co., 99 U. S. 48, 63,
Mobile vs. Tenn., 153 U. S. 486, 502,
Smith vs. Townsend, 148 U. S. 490, 494,
Dewey vs. U. S., 178 U. S. 510, 520,
Endlich, Interpretation of Stat. Ed. 1888, §85.

If, however, it be conceded or held that the Act of May 14, 1880, modified this grant without the consent of the grantee or its assigns, still it is apparent from this record that in neither of the cases was there any "intention of claiming the same under the homestead laws" until the homestead entries were made. In Case No. 164 the party who attempted to make the original homestead entry was Jasper J. Brown, husband of the present intervenor. The entire record of his homestead entry is found in R. 233-270. There is not in that record the slightest evidence of the intent with which Jasper J. Brown originally settled on this land. In his testimony (R. 242-248) he does not utter a single word as to his intent to claim a homestead on this land when he made his original settlement in 1881, or at any subsequent time prior to the attempted entry. All testimony in regard to his intent at that time was taken in 1915, some thirty-three years after the fact, and eleven years after his widow had left the place. It appears that the place of Brown's original occupation had been passed around through some half a dozen other parties (R. 198, 202, 204, 206). Brown died in 1896 (R. 193; the widow moved off the premises in 1904, eleven years prior to this suit (R. 197). She claimed to have rented the place (R. 197), but all she seems to have obtained from it was a few bushels of corn (R. 200), and it clearly appears from the testimony of Mr. Stevens (R. 221) and Mr. Stokes (R. 223) that in 1912 the settlement had been abandoned and the fields were grown

up to weeds and briars, there having been no occupancy for several years; that in 1914 there was no cultivation around the house, and that in 1912 there was no one living on the place, and in 1914 there was a party named La Croix (not shown to be connected with claimant) living there and that around the house there was nothing in cultivation. Mr. Stokes testified that in April, 1915, there were two or three acres freshly plowed up and that the balance of the original Brown settlement was grown up in bushes three or four feet high. The only testimony of the intent of Jasper J. Brown at the time of his original settlement is the following, Mrs. Brown testifying in April, of 1915, says:

Q. Did you intend to make this your home?

A. I did; that was my intention.

Q. Was that your husband's intention?

A. Yes, sir. That is what we moved on the place for. (R. 198.)

We submit that an intention to make a home does not create an intention to make a homestead entry, particularly as it appears that as early as 1885 or 1886, prior to the enactment of the Act of February 8, 1887, Brown knew that this was railroad land (R. 205).

It is simply impossible that a bona fide intent to homestead can exist when the homesteader knows that the land is another's.

J. H. Hagen, a brother of intervenor, states (R. 204) that Brown claimed the land as his homestead when he went on and that was generally known in the community; Brown told him so. This was, of course, pure hearsay and incompetent. At this time the witness was a small boy (R. 205). H. H. Hagen, another brother of the claimant says (R. 208) that he knows that Brown claimed the land where the cultivation and improvements were. This is all of the testimony as to Brown's intention prior to his attempted record entry.

In Case No. 165 (R. 119, 120), in the matter of the application of William R. Turner to homestead, he says, testifying January 23, 1897 (R. 120):

"My reason for not applying to homestead this land in contest before was because I thought things would always remain as they were and I could continue to remain upon the land. I thought that no one would interrupt my staying on the land where I was; I thought things would continue to be as they were. I have always intended to make this tract in contest my home, but I did not intend it when I settled it as lands were free then to all and no one interrupted a person."

On page 119 Turner further says:

"I am the first man who settled this land, and that was in the year 1872. I have lived there ever since."

Testifying April 30, 1915, eighteen years later and forty-three years after his settlement, he says he first moved on the land in 1868 (R. 96), moved off in 1869 (R. 97), and moved back in 1872 (R. 97). He was asked (R. 98):

"Q. In your testimony in the contest with the Railroad you are quoted as stating that you always intended to make the tract your home but did not intend entering it when you settled on it as lands were free then to all and no one interrupted a person. What did you state, or what did you mean?"

This question was objected to.

Q. (R. 99.) Explain what you meant, Mr. Turner.

A. I just meant that I thought I would quit farming at the time and work at this logging business.

Q. That was in 1869?

A. Yes, sir, and I soon found out that there was not no living in the logging business for me and I came back to my farm.

Q. Well, what was your intention when you moved back on it in 1872?

A. To farm.

Q. To make it your home?

A. Yes, sir.

Q. Why did you not immediately apply to homestead it?

A. Well, I thought I had plenty of time to homestead it when I got ready.

Q. You said that when you moved on the lands you intended to make it your home (the second time, in 1872)—you intended to make it your permanent home and to enter it?

A. Yes.

Q. What forties did you intend to enter?

A. All four."

We submit that Turner's testimony given in the homestead entry proceedings conclusively shows that he claimed settlement only from 1872 and that his reason for not homesteading as given then relates to his occupancy from 1872, not to 1868; that the testimony shows no intent to homestead until he got ready, and when he got ready was in 1896, and that at that time he was too late as the lands were not then open to entry. It is urged that the defendants had no right to question the claimant's alleged rights in these particulars. Presumably this claim is rested upon Svor vs. Morris, 227 U. S. 524, 528. The point there decided related simply to the time when the homestead entry was attempted to be made and not to the intent with which the original settlement was made. It has always been held by this Court that mere settlement without more neither attached nor initiated any claim to Government lands.

Lounsdale vs. Daniels, 100 U. S. 113, 116,
Whitney vs. Taylor, 150 U. S. 85,
Campbell vs. Wade, 132 U. S. 34,
U. S. vs. C. M. & St. P., 160 U. S. 824,
U. S. vs. C. M. & St. P., 218 U. S. 33,
Sparks vs. Pierce, 115 U. S. 408,
Yosemite Cases, 15 Wall. 77.

The Act of May 14, 1880, makes an intention to claim the land settled upon as a homestead at the time of settlement a necessary prerequisite to such an application. A party seeking to oust the holder of the legal title must show a superior equity. We respectfully submit that this is not done unless prior to the vesting of the Railroad's legal right, the claimant has complied with the conditions the statute prescribes.

VII.

The laches of the intervenors bar them from the relief sought.

Although the Government is complainant, and laches cannot be pleaded against it, it is manifest from the record that this is a suit by the Government solely for the purpose of enforcing an asserted private right. In such cases laches is a good defense.

- U. S. vs. Beebe, 127 U. S. 338, 347,
- U. S. vs. Des Moines, 142 U. S. 510, 538,
- Moran vs. Horsky, 178 U. S. 205, 214,
- U. S. vs. Amer. Bell Tel. Co., 167 U. S. 224, 265,
- Francee vs. Saratoga, 191 U. S. 427.

In Case No. 164, Brown claims to have settled upon this land, then under withdrawal, in April, 1881. He made no effort to assert a homestead entry until August 10, 1888, a period of seven years and four months, although he knew as early as 1885 or 1886 that it was railroad land (R. 205). August 10, 1888, he filed record entry, and although he knew as early as October 12, 1888, that the Register and Receiver thought he was entitled to the land, he made no effort to assert his title against the Railroad Company or the purchasers from it. He remained quiescent while three forties of the land to which claim is now asserted were patented to the Rail-

road Company. He remained inactive while the Railroad Company sold all of the land to other parties. He did nothing while the statute of limitations was running in favor of the patent. He allowed this title to pass current through a number of different parties, and during all of the period from 1881 down to the time of the filing of this suit—a period of more than thirty-three years—he declined to claim the ownership of this property for the purpose of paying taxes thereon although the property was taxable, part of it from 1885 and the remainder from 1889 on. The laws of Louisiana require the taxpayer to render annually to the assessor a sworn list, with descriptions and valuations, of the property claimed by him or in his possession. (See appendix in Brief 166, where the Louisiana tax statute is quoted.)

From 1904 to the time of the filing of this suit, the land was, for the major part of the time, unoccupied. The testimony justifies the inference that there was no occupation from 1908 until 1914, and that the occupation in 1914 was merely for the purpose of this suit.

In Case No. 165, Turner claims to have made settlement in 1872, at a time when no homestead claim could be initiated or attached without a record entry in the proper land office. As Turner must be presumed to have known the law, it is manifest that his testimony that he had no present intent of homesteading is true, for he must have known that a record entry was necessary. This absence of intent on Turner's part when the settlement began is convincing evidence of laches, particularly in view of the fact that for twenty-four years he made no effort to manifest an intent to homestead. In the meantime, the Railroad selections had been made and approved, the land patented, the patent title confirmed by statute, and the lands repeatedly sold to other parties. During all this time Turner did absolutely nothing to assert his title

although he must have known the facts in the case. Turner also made no claim on this land to the tax assessor. Where a party, knowing that others are dealing with property which he claims, sit quietly by and allows others to act to his detriment without assertion of his rights, he is guilty of gross laches which, after this lapse of time, should bar him from any relief.

VIII.

It is an adjudicated fact that at the time the lands involved in these cases were patented they were not in possession of others thereto entitled. Possession is a question of fact.

Johnson vs. Drew, 171 U. S. 93,—on page 99 the Court said:

“Whether a party was or was not in possession of a particular tract at a given time is a question of fact, depending upon parol testimony; and if there is any one thing respecting the administration of the public lands which must be considered as settled by repeated adjudications of this Court, it is that the decision of the land department upon mere questions of fact is, in the absence of fraud or deceit, conclusive, and such questions cannot thereafter be relitigated in the courts.”

Gertgens vs. O'Connor, 191 U. S. 237,

Logan vs. Davis, 233 U. S. 623, 630.

At the time of the issuance of the patents herein, the land office had jurisdiction to determine the existence of any facts necessary to authorize such issuance. It did determine them. Such determination is conclusive in the absence of fraud, and as no fraud is here alleged, must necessarily be conclusive.

Burke vs. S. P., 234 U. S. 669,

Barden vs. N. P. 154, U. S. 288,

Davis vs. Weibbold, 139 U. S. 207,

Smelting Co. vs. U. S., 104 U. S. 636, 640,

Shaw vs. Kellogg, 130 U. S. 312, 339,
Knight vs. U. S. Land Assn., 142 U. S. 161, 176,
U. S. vs. Miner, 114 U. S. 233.

The case of *Johnson vs. Drew* is decisively in point here. Drew brought an action of ejectment to recover certain lands in Florida. Johnson, the defendant, pleaded that the plaintiff's title rested on a patent from the United States issued on a location of Valentine scrip, that such scrip was by the terms of the statute under which it was issued to be located only upon unoccupied and unappropriated lands of the United States, and that the land in controversy was at the time of the location of the scrip in the actual occupancy of the defendant. The Valentine scrip act (17 Stat. 649) authorized the location of the scrip on "the unoccupied and unappropriated public lands of the United States not mineral." Plaintiff had patent dated September 30, 1882, which recited that it was upon a location of Valentine scrip. The defendant offered evidence tending to show that he entered into occupation on the tract in controversy in 1871 and had continued in occupancy ever since. From this he claimed that the scrip was improperly located and the patent void, as having been issued in defiance of law. Page 99 the Court said:

"The question arises whether a party can defend against a patent duly issued therefor upon an entry made in the local land office on the ground that he was in actual possession of the land at the time of the issue of the patent. We are of opinion that he cannot. It appears from the testimony that the defendant, although in occupation of this land, as he says, from 1871, never attempted to make any entry in the local land office, never took any steps to secure a title, and in fact did nothing until after the issue of a patent, when he began to make inquiry as to his supposed rights."

A judgment for patentee was affirmed.

In the case at bar, if, as claimed by the complainants, occupancy excepted the lands from the grant both under the original grant and the Act of February 8, 1887, then before issuing the patent it was necessary for the land office to determine whether or not the land was occupied, and the decision in Johnson vs. Drew is conclusive against the complainants' right now to go back of that adjudication. It is no answer to this proposition to say that the land office subsequently reexamined this question of possession and reversed its former decision, because such reexamination was after the title had passed from the Government and, in the Turner case, after the lands had been sold to third parties, who were not parties to the contest.

IX.

The United States is barred from the cancellation prayed by its own statutes of limitations and the intervenors are equally so.

So far as plea of limitation is concerned, it is immaterial whether the patent was erroneous or void, valid or invalid, when issued. The statutes of limitations have validated it.

March 2, 1896 (29 Stat. 42), Congress provided:

"That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under railroad or wagon road grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of Section 8 of Chapter 651 of the Acts of the Second Session of the Fifty-first Congress and amendments thereto, is extended accordingly as to the patents herein referred to. But no patent to any lands held by bona fide purchasers shall be vacated or annulled, but the right of such purchaser is hereby confirmed."

The limitation of Section 8 of Chapter 651 is as follows (26 Stat. 1093, 1099):

"That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years from the date of the issuance of such patent."

If the patent was valid when issued or was void on its face, the Act of 1891 would cover it. As it is a railroad grant patent, if it was, as appellants claim, erroneously issued, the Act of 1896 would cover it. The patents involved in these cases were issued approximately thirty years and twenty-six years respectively prior to the commencement of suit. Under the Act of March 2, 1896, the limitation expired March 3, 1901. Under the Act of March 3, 1891, the limitation expired March 3, 1896.

Winona vs. U. S., 165 U. S. 463,
 U. S. vs. S. P., 184 U. S. 49,
 S. P. vs. U. S., 228 U. S. 618,
 Burke vs. S. P., 234 U. S. 693,
 U. S. vs. S. P., 167 Fed. 96, 100,
 U. S. vs. C. M. & St. P., 195 U. S. 524,
 U. S. vs. St. P. M. & M., 225 Fed. 27,
 U. S. vs. O. & C. R. R., 186 Fed. 861,
 Iatt vs. Fairecloth, 61 So. 866,
 Bodeaw vs. Bonnette, 65 So. 493.

The running of the statute of limitations bars the United States as to the cancellation prayed.

U. S. vs. Chandler, 209 U. S. 447,
 No. Pac. vs. U. S., 227 U. S. 355,
 U. S. vs. Winona, 165 U. S. 476,
 Burke vs. So. Pac., 234 U. S. 669, 693.

In *United States vs. Chandler* this Court said:

"In form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land, at least, which cannot escape from the jurisdiction, generally are held to affect the right, even if in terms only directed against the remedy. *Leffingwell vs. Warren*, 2 Black 599, 605; *Sharon vs. Tucker*, 144 U. S. 533; *Davis vs. Mills*, 194 U. S. 451, 457. This statute must be taken to mean that the patent is to be held good and is to have the same effect against the United States that it would have had if it had been valid in the first instance. See *United States vs. Winona & St. Peter R. R. Co.*, 165 U. S. 463, 476."

In *United States vs. Whited & Wheless, Ltd.*, Adv. Op. 1917-1918, No. 12, pp. 420, 423, this Court, commenting upon the language above quoted, says:

"But that is merely an emphatic way of saying that the title is made good. It does not import that the collateral effects of fraud in obtaining the patent are purged. The element of bad faith or fraud was expressly excluded."

As there is in this case no bad faith or fraud charged or proved, the patent is to be held good under these decisions. If the patent is good, it necessarily must be good against the world. It cannot be good as to one party and bad as to another after the statute of limitations has barred any assault upon it.

Budzisz vs. Ill. Steel Co., 82 Fed. 160.

A statute of limitations may give title.

Montoya vs. Gonzales, 232 U. S. 375.

It was claimed in the court below that the statute of limitations had no application in these cases for the reason that a special act is not repealed or amended by a subsequent general act. *U. S. vs. Nix*, 189 U. S. 199, 205, and similar cases are cited in support of the rule. It is claimed that the act of February 8, 1887, is a special act,

which required the consent of the Railroad Company to make it effective and that the Acts of Limitation of 1891 and 1896 are general acts. This contention is of no force. The rule invoked is never applied except when special and subsequent general acts cover the same subject in whole or in part, as will be shown by the cases noted below. The Act of February 8, 1887, while undoubtedly a special act applying only to the New Orleans Pacific grant, is a granting act. The statutes of limitations are totally different in subject matter and object. The special act in question and the later general acts having no common provisions, may and should stand together. The cases illustrating the rule that a special act is not repealed or amended by a subsequent general act are cases where the two acts are upon the same subject and where the general act, standing alone, would be broad enough to cover the situation provided by the special act, and no expressed intent as to the special act's being affected appears.

- U. S. vs. Nix, 189 U. S. 199, 205,
- Townsend vs. Little, 109 U. S. 504,
- Ex parte Crowdog, 109 U. S. 556,
- Rodger vs. U. S., 185 U. S. 83,
- U. S. vs. Healey, 160 U. S. 136,
- Frost vs. Wenie, 157 U. S. 46,
- U. S. vs. Greathouse, 166 U. S. 601, 602.

These cases show that where the general statute treats of something not covered by the special statute, each is independent of the other, not modified or limited by the other, and the scope of each is measured by its own language.

Again, where the Acts of Limitations have been before the courts, they have been treated as general statutes applicable to all railroad grants.

- Logan vs. Davis, 233 U. S. 613,

- Knepper vs. Sands, 194 U. S. 476,
 So. Pac. vs. U. S., 228 U. S. 618,
 U. S. vs. So. Pac., 184 U. S. 49,
 U. S. vs. C. M. & St. P., 195 U. S. 524,
 Gertgens vs. O'Connor, 191 U. S. 237,
 Land & Water Co. vs. San Jose Ranch, 189 U. S.
 177,
 Winona vs. U. S., 165 U. S. 463,
 U. S. vs. Ore. & Cal., 186 Fed. 861, 889,
 U. S. vs. So. Pac., 157 Fed. 96, 100,
 Burke vs. So. Pac., 234 U. S. 669, 693,
 Iatt vs. Faircloth, 61 So. Rep. 866,
 Bodeaw vs. Bonnette, 65 So. Rep. 493.

The most conclusive answer to this position of the appellants is this: All of the railroad grants ever made by Congress were special acts which, like the Act of February 8, 1887, had to be accepted by the grantees before becoming effective. If it be true, as contended, that the limitation acts do not apply to railroad grants because the former are general acts and the latter special, then it must be true that those general acts cannot apply to any railroad grant whatsoever, since all of the railroad grants are special acts which have required the consent of the grantees to render them effective. Such a construction of the acts in question will nullify them. There would be no grants to which they could apply, and this nullification would be brought about, notwithstanding the fact that the Act of March 2, 1896, is by its express terms applicable to all railroad grants.

X.

The sole error charged in the issuing of these patents is that the lands were excepted from the grant under the provisions of Section 2 of the Act of February 8, 1887. We claim that that section of the Act of February 8,

1887, applies only to granted or "place" lands. It does not apply to "indemnity" lands.

Section 1 of the Act of February 8, 1887, provides:

"That the lands granted to the New Orleans, Baton Rouge & Vicksburg Railroad Company by the Act * * * approved March 3, 1871, are hereby declared to be forfeited to the United States of America in all that part of said grant which is situate on the east side of the Mississippi River, and also in all that part of said grant on the west of the Mississippi River which is opposite to and co-terminous with the part of the New Orleans Pacific Railway Company which was completed on the 5th day of January, 1881; and said lands are restored to the public domain of the United States."

Section 2 provides:

"That the title of the United States and of the original grantee to the lands granted by said Act of Congress of March 3, 1871, to * * * the New Orleans, Baton Rouge & Vicksburg Railroad Company not herein declared forfeited, is relinquished, granted, conveyed and confirmed to the New Orleans Pacific Railroad Company, as the assignee of the New Orleans, Baton Rouge & Vicksburg Railroad Company. * * * Provided, that all said lands occupied by actual settlers at the date of the definite location of said road, and still remaining in their possession, or in the possession of their heirs or assigns, shall be held and deemed excepted from said grant, and shall be subject to entry under the public land laws of the United States."

This Act has no application except to "lands granted", that is, to "place" lands.

(a) On the language of the Act.

To what do the words "all said lands" refer? By the act "the lands granted" to the New Orleans, Baton Rouge & Vicksburg R. R. Co. were forfeited east of the Mississippi and west of the Mississippi south of Whitecastle. The remaining "lands granted" were "relin-

quished, conveyed and confirmed" to the New Orleans Pacific Railway Company, excepting (proviso of Section 2) "all said lands occupied," etc.

Manifestly the words of the proviso "all said lands" refers to the "lands granted" used in the same section of the act, Section 2. They can refer to nothing else, for nothing else is spoken of in the act as being granted. The section relates, therefore, to the "lands granted" and as will be shown below, indemnity lands do not fall within that category. Therefore, it is our contention, which we believe well founded, that by the very language of the act itself, section 2 of the Act of February 8, 1887, does not apply to indemnity lands.

(b) On reason and principle.

The original Act of March 3, 1871, by Section 22 of which this grant was made, puts the grant in this form (see Section 9):

"There is hereby granted • • • every alternate section of public land, not mineral, designated by odd numbers to the amount of twenty alternate sections per mile on each side of said railroad line • • • through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad in California. • • • In case any of said lands shall have been so reserved, occupied or preempted or otherwise disposed of, other lands shall be selected in lieu thereof by the said company under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections first above named, and not including reserved numbers."

By Section 22, the grant to the New Orleans, Baton Rouge & Vicksburg Railroad Company, which is the basis of the grant herein, is in the following language:

"There is hereby granted to said company • • • the same number of alternate sections of public lands per mile, in the State of Louisiana, as are by

this act granted in the State of California • • • and said lands shall be withdrawn from the market, selected, and patents issued therefor • • • upon the same terms and in the same manner and time as is provided for and required from the said Texas Pacific Railroad Company within the State of California, etc."

It will be observed that the statute designates as "granted lands" the lands within the "place limits", and as "lands to be selected in lieu thereof" the lands within the "indemnity limits". It is the law that, as to the lands within the "place limits" the title of the railroad company vests in the specific lands at the time of the filing and approval of its map of location such as is required by the granting act. Such vesting of title to the "place" lands confers, however, on the railroad company no title whatever to "indemnity" land. The title to the "indemnity" lands vests in the railroad company as of the date of selection only on approval of its lists of selection by the Secretary of the Interior. Prior to the filing of those selection lists, any person entitled by law to acquire the lands of the United States may acquire any of the lands within the "indemnity" limits and cut off absolutely any possible right of the railroad company. At the period under discussion, the only way that anyone could acquire lands in Louisiana was under the homestead act. From the time of this grant in 1871 down to the date of the filing of the selection lists, whenever that might happen to be, any occupant of these lands could have made a valid homestead entry of the lands at any time by simply going through the statutory formalities and his homestead entry would be superior to any title the railroad company might acquire. For these reasons it was unnecessary for Congress to undertake to protect actual occupants on the lands (as they undertook to do by the proviso of Section 2 of the act of 1887), where the

occupant was on lands which were within the "indemnity" limits and not within the "place" limits. The title of the railroad company had vested in the "place" lands by the filing of its map of general location in 1871, as provided by the original granting act. If there had been no occasion for the railroad company to appeal to Congress for a confirmation of the grant, the railroad company's title to "place" land would have been absolute from that date, and no settler who had not acquired rights on the record prior to that date would have had any rights against the railroad company. For the purpose of protecting such settlers on such lands against the confirmatory act of 1887, Congress inserted this provision of Section 2, which was clearly to protect the settlers insofar as the lands in the "place" limits were concerned, but which was absolutely unnecessary to protect settlers upon lands within the indemnity limits, because at that time until the selection lists were filed with the Secretary of the Interior, the railroad company had absolutely no right or claim against the United States or anyone else to "indemnity" lands. Before the railroad company could acquire a vested (as distinguished from an inchoate) right in "indemnity" lands, it was necessary that it be determined,

- (1) That there was a shortage of the grant within the "place" limits,
- (2) The railroad company must have selected its "indemnity" lands and filed its list with the Secretary of the Interior,
- (3) The Secretary of the Interior must have passed on those lists, determined that the railroad company was entitled to select those lands, which involved a determination by the Secretary of the Interior that no one else had any right as against the United States, and the Secretary of the Interior must have approved those lists.

Not until then did the railroad acquire vested rights against the United States or any one else in the indemnity lands. For these reasons on principle and reason, as on the language of the act, we conclude that the proviso does not apply to "indemnity" lands.

(e) On Authority.

The point for which we contend has been decided.

Barney vs. Winona, 117 U. S. 228.

This case involved a grant of March 3, 1857, to the State of Minnesota to aid in the construction of railroads (11 Stat. L. 195). The grant was of every alternate section designated by odd numbers for six sections in width on each side of the railroad, with the right to select indemnity lands within fifteen miles. By the Act of Congress of March 3, 1865, this grant was increased to ten sections per mile, and the indemnity limits enlarged from fifteen to twenty miles (13 Stat. 526). The third section of this act provides:

"That any lands which may have been granted to the State of Minnesota for the purpose of aiding in the construction of any railroads, which might have been located within the limits of the extension, should be deducted from the full quantity granted by the act."

"The full quantity *granted* by the act" was the four additional sections, as was held by the Supreme Court of the United States in the case of Barney vs. Winona, 113 U. S. 621.

In October, 1867, the company agreed with the plaintiffs to convey to them as many acres of land as it should receive by reason of the construction of the road already made. This suit was brought to enforce the specific performance of the contract and the only question was as to the quantity of land to be conveyed under it. By the act of 1857 lands were also granted to the State of Min-

nesota for construction of a railroad, which intersected the defendant's road, and the lands of the second railroad were located within the limits of the extension of four sections made by the act of 1865. In deducting the lands which had been excepted from the grant by reason of the grant to the other railroad being within the extension of the original grant, the Court below deducted lands within the "indemnity" limits instead of confining the deduction to lands within the "place" limits. The Supreme Court on page 231, says:

"In this construction of the reservation by the third section of the Act of 1865, we think the Court erred. The reservation from the four sections was of lands previously granted, which were located within them. The previous grant was of lands in place, for it was of alternate sections designated by odd numbers for six sections in width on either side of the road, and that portion of it was reserved from the subsequent grant, which fell within the four new sections, also lands in place."

"In the construction of land grant acts in aid of railroads there is a well established distinction between 'granted lands' and 'indemnity lands'. The former are those falling within the limits specially designated, and the title to which obtains when the lands are located and by an approved and accepted survey of the line of the road filed in the land department, as of the date of Act of Congress. The latter are those selected in lieu of parcels lost by previous disposition or reservation for other purposes, and the title to which accrues only from the time of their exception. It is the 'granted lands' of the prior grant falling within the six-mile limit that in our opinion are reserved and not the possible indemnity lands which may be subsequently acquired, these granted lands of the prior grant being in place could be readily deducted from the four sections as it passed whenever the roads of the two companies intersected, and the lands fell within the four sections. The quantity thus granted is found by the Special Masters appointed by the Court to be 15,000.45 acres, this quantity only in addition to the

lands used for the tracks of the Winona Company, etc., * * * should therefore be deducted from the number of acres to conveyance of which from the company, the plaintiffs by decree * * * were adjudged entitled." Decree reversed.

In *Winona vs. Barney*, 113 U. S. 618, the Court, speaking of the railroad land grant to the State of Minnesota, March 3, 1857, says on page 626:

"The indemnity clause covers losses from the grant * * * when it afterwards provides for indemnity for the lost portions of the lands 'granted as aforesaid', it means of lands purporting to be covered by those terms."

Again, on page 627, commenting on the same act, the Court says:

"The grant by the Act of 1857 is one of description, that is, of land in place and not of quantity. It is of every alternate section designated by odd numbers for six sections on each side of the road, that is of particular parcels of land lying within certain defined lateral limits to the road and described by numbers on the public surveys. And the indemnity clause provides for loss from those parcels. * * * "

And speaking of the Act of March 3, 1865, which enlarged the grant made by the Act of March 3, 1857, the Court says, page 628:

"The only lands granted by the Act of 1865 are the four sections for each mile additional to the original six, accompanied with a right to select indemnity lands within twenty miles of the road."

In *Barney vs. Winona*, 117 U. S. 228, there is an express ruling that an exception from "granted lands" does not apply to "indemnity" lands.

In *Hewett vs. Schultz*, 1900, 180 Mich. 139, a similar distinction was made.

In *Southern Pacific vs. Bell*, 183 U. S. 675 (1902), this

case follows the case last cited and expressly holds that where the statute authorizes the withdrawal of "lands hereby granted" it did not authorize the withdrawal of indemnity lands. It follows *a fortiori* that where an exception is made for "lands granted" such an exception applies only to "place" lands.

In the case last cited, commenting on sections 3 and 4 of the Atlantic and Pacific grant of July 27, 1866, the Court said:

"By the former there is 'hereby granted every alternate section of public land, not mineral, designated by odd numbers to the number of twenty alternate sections per mile on each side of said railroad line, as said company may adopt through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad, when it passes through any state'. These words terminate the grant. * * * But there follows another clause that, 'Whenever, prior to said time, any of said sections or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by the said company in lieu thereof under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections', etc. There is here a clear distinction between the lands granted *in praesenti* in the first clause, and lands to be thereafter selected by the company when the deficiency in the granted lands shall be ascertained. The sixth section carries out the same idea. It requires a survey of forty miles in width on both sides of the line, whether passing through state or territories. This would include only the granted or place lands within a territory, but within the State would cover the indemnity lands as well. There is no order in the act to withdraw any lands from settlement or sale. * * * But as the power to withdraw extends only to the 'lands hereby granted' and all other lands, except those hereby granted, remain open to settlement, we are thrown back upon Section

3 to determine what are the lands 'hereby granted'.

Now, as already observed there is a clear distinction in Section 3 between granted lands and lands to be selected after the deficiency in the granted lands has been ascertained. * * * We are therefore of the opinion that the Act of July 27, 1866, did not authorize the withdrawal by the Secretary of the Interior of the indemnity lands."

1911, *United States vs. Southern Pacific*, 223 U. S. 565:

"An indemnity grant, like the residuary clause in a will, contemplates the uncertain and looks to the future. What a railroad is to be indemnified for may be fixed as of the moment of the grant, but what it may select when its right to indemnity is determined depends on the state of the lands selected at the moment of choice. Of course the railroad is limited in choosing by the terms of the indemnity grant, but the so-called grant is rather to be described as a power. Ordinarily no color of title is gained until the power is exercised. When it is exercised in satisfaction of a meritorious claim which the Government created upon valuable consideration and which it must be taken to have intended to satisfy (so far as it may be satisfied within the territorial limits laid down), it seems to us that lands within those limits should not be excluded simply because in a different event they would have been subject to a paramount claim."

See also:

Clark vs. Herington, 186 U. S. 206,
 Ore. & Cal. R. R. Co. vs. U. S., 189 U. S. 103,
 Humbird vs. Avery, 195 U. S. 508,
 Hoyt vs. Weyerhauser, 161 Fed. 328,
 S. C. 219 U. S. 381,
 U. S. vs. So. Pac., 93 C. C. A. 147,
 S. C. 161 Fed. 510.

It will be thus seen that the proviso of Section 2 of the Act of February 8, 1887, which has been termed the

"Magna Charta" of the so-called settlers' rights, not only by the language of the act, and by reason and principle, but also by express authority, does not apply to lands within the indemnity limits of the grant.

Inasmuch as Section 2 of the Act of 1887, which is claimed to have excepted these lands from the grant, does not have that effect, the entire basis of the Government's bill ceases to exist, for the bill charges no other error.

XI.

If we examine these cases solely on the basis of the original granting Act of March 3, 1871, no error is apparent.

In *Tarpey vs. Madsen*, this Court established the rule that the relative rights of the grantee company and an individual entryman must be determined by record evidence.

Tarpey vs. Madsen, 178 U. S. 215,
So. Pac. vs. U. S., 109 Fed. 123,
 S. C. 9 C. C. A. 1901,

Eastern Ore. Land Co. vs. Brosman, 147 Fed. 811.
 In this case the Court said:

"It must be remembered that mere occupation of public lands gives no right as against the Government. * * * It is undoubtedly true that one occupying land with the purpose of preemption is given thirty days in which to file with the register of the land office his declaratory statement * * * and since 1880 the same right has been possessed by anyone desiring to make a homestead entry. (Act of May 14, 1880, 21 Stat. c. 89, sec. 3.) So that any controversy between two occupants of a tract open to preemption and homestead entry is not determined by the mere time of the filing of the respective claims in the land office, but by the fact of prior occupancy, and these controversies are of frequent cognizance. Oral evidence, therefore, of the date of

occupancy may be decisive of the controversy between such individual applicants for a tract of public land, but by decisions of this court, running back to 1882, as between a railroad company holding a land grant and an individual entrymen the question of right has been declared to rest not on the mere matter of occupancy but upon the state of the record. All the cases in this court in which this question has been discussed and the conclusion announced, have been since the Act of 1880, giving to persons seeking a homestead the same rights in respect to occupancy as to persons intending a preemption."

The Court then proceeds to call attention to a number of cases, and further says:

"So it is that interpreting the act making the grant as a law as well as a grant, * * * this Court properly held that the records made in the office of the Secretary of the Interior and in the local land office should be conclusive as between the company and the individual entryman. And if the ruling at times may operate against the individual entryman, it does so more frequently against the railroad company. * * * We are of the opinion that a proper interpretation of the acts of Congress making railroad grants like the one in question requires that the relative rights of the company and an individual entryman, must be determined, not by the act of the company in itself fixing definitely the line of its road, or by the mere occupancy of the individual, but by a record evidence, on the one part the filing of the map in the office of the Secretary of the Interior, and, on the other the declaration or entry in the local land office. In this way matters resting on oral testimony are eliminated, a certainty and definiteness is given to the rights of each, the grant becomes fixed and definite; and while, as repeatedly held, the railroad company may not question the validity or propriety of the entryman's claim of record, its rights ought not to be defeated long years after its title had apparently fixed, by fugitive and uncertain testimony of occupation; for if that be the rule, as admitted by counsel for defendant in error on the argument, the time will never

come at which it can be certain that the railroad company has acquired an indefeasible title to any tract."

The force of the Court's reasoning is well illustrated by the facts of these cases.

In Case No. 164 it appears that the squatter's rights in the settlement in question had been passed through a number of different hands before Brown undertook to occupy. At this time this land was open to settlement. Brown must have been presumed to have known this fact, but made no effort to make any record entry. In 1885 or 1886 he was informed that this was railroad land. He was thereby expressly put upon notice that if he had any lawful claim to the land he should take measures to protect his interest. This he did not do. In August, 1888, he filed a homestead entry. While the contest in this regard was pending, three forties of the land involved were patented; the other had been patented in 1885. Still Brown does nothing to protect his alleged rights. So far as the record shows, the railroad company had selected the lands and those selections had been approved by the Secretary of the Interior before Brown ever made any homestead entry. On the record the Railroad is prior in time and, therefore, prior in right.

In Case No. 165, the settlement was made long prior to the Act of May 14, 1880, at a time when a homestead claim could be initiated or attached only by an entry in the local land office. None was made or attempted to be made for a period of twenty-four years. In the meantime, the lands had been selected, the selections approved and patents issued to the railroad company, and the lands sold to third parties.

In neither of these cases is there any testimony which manifests any intent to make a homestead entry on these lands prior to the approval of the selections by the rail-

road company. All the evidence of intent comes from thirty to forty years after the fact.

We submit that if such evidence of intent as we have in these cases is to prevail over a United States patent after the statute of limitations has run in favor of the patent, that no railroad grant title will be safe from attack, since it is impossible to rebut intent evidence. Intent is an operation of the mind. Except as it is manifested by acts, it is impossible for anyone to determine the intent of another, and when an individual undertakes to testify as to his intentions thirty to forty years prior to giving his testimony and those intentions are not manifested by any acts contemporaneous with the period, there is no possible rebuttal of such testimony to be had. The solemn acts of the Government ~~which it has~~ expressly provided shall not be set aside after a certain lapse of time, ought not to be declared worthless, on any such testimony.

An affirmance is asked.

Mark Norris.
MARK NORRIS,
Of Counsel for Defendants.

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Nos. 164, 165, 166

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

THE UNITED STATES, Complainant, and
JOSEPHINE BROWN, Intervening Com-
plainant, Appellants,

versus

NEW ORLEANS PACIFIC RAILWAY
COMPANY, W. R. PICKERING LUM-
BER COMPANY, and RIVER LAND &
LUMBER COMPANY,
Defendants and Appellees.

IN EQUITY
No. 164

THE UNITED STATES, Complainant, and
WILLIAM R. TURNER, Intervening Com-
plainant, Appellants,

versus

NEW ORLEANS PACIFIC RAILWAY
COMPANY, W. R. PICKERING LUM-
BER COMPANY,
Defendants and Appellees.

IN EQUITY
No. 165

THE UNITED STATES, Complainant, and
STEPHEN N. GRANT, Intervening Com-
plainant, Appellants,

versus

NEW ORLEANS PACIFIC RAILWAY
COMPANY, W. R. PICKERING LUM-
BER COMPANY and SOUTHLAND
LUMBER COMPANY,
Defendants and Appellees.

IN EQUITY
No. 166

Appeals from the United States Circuit Court of Appeals
for the Fifth Circuit.

Supplemental Brief for Defendants and Appellees.

I. INTRODUCTORY.

The brief filed herein for the United States, appellant, was due, under the rule (No. 21), on September 23, 1918—the cases being assigned for argument for October 14, 1918. Notwithstanding a previous request by appellees that the rule be complied with, the Government's brief was filed on October 8 and copies obtained by counsel for appellees in Washington on October 14, the day the case would have been called, but for the adjournment of the Court.

The brief filed by the Government places the issues to be determined upon some points not raised below and stresses others to an extent and in a connection different from the positions assumed before the District and Circuit Courts.

It is felt that a reply brief for appellees is proper under the rule (No. 20) and will be helpful in clearing the issues and of assistance in a determination thereof.

Leave of the Court to file and its consideration hereof, is respectfully sought.

II. A STATEMENT OF THE ISSUES.

The brief of the Government appears to be based upon three main propositions:

A. That the settler-claimants have, under the Act of February 8, 1887, special and preferential rights in these lands. (Post pp. 5-13.)

B. That the Act of February 8, 1887, constituted the Land Department an extraordinary tribunal for the adjudication of these rights, and that such finding is conclusive. (Post p. 10.)

C. That these purchasers (appellees) all bought with notice of the rights of the claimants and of the conclusive adjudications of the Land Department. (Post. pp. 25-27.)

By these major premises the Government seeks to avoid the effect of the following main points relied on by the appellees and sustained below:

1. That these patents were regularly and rightly issued because Section 2 of the Act of February 8, 1887, applies neither to lands which were patent previous to the passage of that act ("patented lands"), nor to ("indemnity") lands, selected in lieu of a failure of the lands granted within the primary limits of the grant ("place" lands).
2. That neither sections two, four or six or any other part of the Act of February 8, 1887, granted to these intervenors any special or preferential rights in these lands.
3. That this litigation involves neither an interest of the Government, an obligation to the public or a duty to these intervenors, and therefore is altogether a conflict of private rights, which both the United States and the intervenors are without capacity to maintain herein.
4. That the alleged rights of the Government and of these intervenors are barred by the prescription, limitation and confirmation timely and properly plead both in bar of the action and, affirmatively, as a muniment of title.
5. That the bill is without equity. Both the Government, admittedly a nominal party, and these in-

tervenors, the settler-claimants, are, alike, estopped to thus question these patents, twenty-nine years after their issuance.

6. That these defendants (appellees) are *bona fide* purchasers, for value and without notice, both in the meaning of the general rule and the confirmatory statutes plead.

7. That at the time these lands were patented, it was adjudicated that no one was in possession; that they were public lands in every sense of the term.

8. That the relative rights of a grantee company of an individual occupant or entryman must be determined by record evidence under the New Orleans Pacific Grant the same as under other railroad grants.

9. That these lands were rightly patented under the general location of November 11, 1871, as required by the Act of March 3, 1871, as well as under the definite location of November 17, 1882.

All of these points and others are presented in the original briefs filed herein by appellees. The Government's brief, however, raises some contentions not before urged in this litigation and, seemingly, revives others, which were not stressed heretofore. We, therefore, submit a detailed interpretation of the Act of February 8, 1887, which forms the basis of every right seriously claimed by these intervenors or by the Government on their behalf, and endeavor to point out the necessary legal results logically flowing therefrom.

In the light of the appellants' brief, we seek to show the essential fallacies in their contentions and to point out the fundamental legal principles upon which these issues rest.

III. ARGUMENT.

A. What is the nature and extent of the right conferred upon the settler by the Act of February 8, 1887?

1. AN INTERPRETATION OF THE ACT:

SECTION 1.

By Section 1, the "lands granted" (i. e., "place" lands, *Barney v. Winona*, 117 U. S., 228; *So. Pac. v. Bell*, 183 U. S., 675;) from New Orleans to Whitecastle were forfeited and restored to the public domain. There being no "place" lands in this section of the road, there could be no "indemnity" in that section, since "indemnity" lands exist only in lieu of "place" lands lost. This section one, therefore, cancelled the entire grant. NO POSSIBLE CLAIM CAN BE MADE THAT THIS SECTION GAVE THE SETTLERS ANY RIGHTS.

SECTION 2.

By Section 2, the title of the United States and of the original grantee to the "lands granted" and not forfeited by the previous section, is "relinquished, granted, conveyed and confirmed" to the New Orleans Pacific Railway Company, to be located according to the map of November 17, 1882.

In *N. O. P. Ry. Co. v. United States*, 124 U. S., 126, it is stated that the road was built "within the limits of the lands withdrawn for its grantee and substantially upon the course, direction and general route filed by such grantor." THIS SHOWS THAT THERE WAS NO DIFFERENCE IN THE LOCATION OF THE LANDS BY THE GENERAL ROUTE MAP, WHICH WAS THE ONLY MAP THE ORIGINAL ACT REQUIRED (Secs. 12 and 22, Act March 3, 1871, 16 Stat. L., 573) AND BY THE MAP OF NOVEMBER 17, 1882.

In this Section 2 of the Act there is an exception of *such of "said lands"* (i. e., lands granted or "place" lands) as were occupied by actual settlers on November 17, 1882, and were still occupied by them or their heirs or assigns on February 8, 1887. The said excepted lands, namely, the excepted granted lands, were made subject to entry under the public land laws. Such lands are restored to the public domain (i. e., "shall be subject to entry"—in no way limited—"under the public land laws of the United States.") SUCH LANDS ARE PUBLIC LANDS.

Newhall v. Sanger, 92 U. S., 763.

Mann v. Tacoma, 153 U. S., 284.

Barker v. Harvey, 181 U. S., 490.

Minnesota v. Hitchcock, 185 U. S., 391.

Union Pac. v. Harris, 215 U. S., 388.

Mo. Kan. & Tex. v. United States, 235 U. S., 40.

It is alleged in these bills and admitted in the answers (par. 2 of each) that at the time of patenting (March 3,

1885, except as to 120 acres in No. 164, August 8, 1889) these lands were a part of the public lands of the United States (Adm. 7, Rec. 164, p. 78; Adm. 7, Rec. 165, p. 53; Adm. 6, Rec. 166, p. 78).

The Government claims that under the proviso to Section 2, above analyzed, both "place" and "indemnity" lands as well as both land previously "patented" and subsequently patented, ("unpatented") were alike, thereby, excepted from the operation of the grant in all cases where the necessary facts were established. Further that, in addition to being so reserved from the grant, such lands did not become a part of the public domain (subject to entry under the land laws, etc.), but were, set aside, or held in trust, for the then settlers or occupants who had certain preferential rights thereto—in addition to such rights or equities as might or might not flow from the general operation of the homestead laws. (Government's Brief, pp. 27-40.)

It is our contention that the exception of Section 2 applies only to "place" lands to be subsequently patented. (Appellees' Original Brief No. 166, pp. 24-34.)

We are unable to read from this section any specific right—preferential or otherwise—to any individual, settler or occupant. The proviso leaves the excepted lands subject to entry under the public land laws. THE ONLY RIGHT WHICH A THEN SETTLER OR OCCUPANT THEREON WOULD HAVE UNDER THIS SECTION TWO IS THE RIGHT COMMON, UNDER THE PUBLIC LAND LAWS, TO EVERY AMERICAN CITIZEN. It is manifest that the Government's brief intends to interpolate into the un-

ambiguous language of this section, words or meanings which are not otherwise to be found therein.

This should not be allowed.

United States v. Dickson, 15 Pet., 165.

Atlantic Coast Line v. Mazursky, 216 U. S.,
131.

In *United States v. Dickson*, Mr. Justice Story said:

"The general rule of law which has always prevailed, and become consecrated almost as a maximum in the interpretation of statutes, that where the enacting clause is general in its language and objects, and the proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception must establish it as being within the words as well as within the reason thereof."

In *Atlantic Coast Line R. R. v. Mazursky*, Mr. Chief Justice Fuller said (p. 131) :

"The rule is that all parts of the statute, including provisos, are to be construed together and effect given, if possible, to all. But it is contrary to reason as well as authority to extend by implication a proviso to cover that which is opposed to the express language of the main enactment." Citing authorities.

SECTION 3.

SECTION THREE CONFERS NO RIGHTS UPON THE SETTLERS. It simply provides when the act shall take effect. This was April 20, 1887.

SECTION 4.

Section 4 makes it the duty of the Secretary of the Interior, in issuing patents for the "lands conveyed herein" ("place" lands) to provide that persons in actual occupancy on December 1, 1884, of any of the lands to which the railroad is entitled under the provisions of the act and who are qualified persons under the homestead and pre-emption acts, should have the opportunity to buy from the Railroad Company the land they occupy for \$2.00 an acre—the railroad title being, of course, confirmed.

The Government argues much to differentiate the rights conferred upon the settlers by Sec. 4 from those of Sec. 2 (Government's Brief, pp. 30-33.) It appears to us useless to discuss what particular lands or settlers Section 4 applied to—whether to lands already patented or those yet to be patented, or whether it covers "place" or "indemnity" lands, or just what settlers are contemplated—because this section was intended to give certain settlers the right to purchase certain lands the railroad's title to which was confirmed, and *none of these claimants ever asserted or attempted to assert any rights under this section.* Certainly if whatever rights were conferred were never sought to be exercised, a discussion of their nature is of no consequence.

The only relevancy of Section 4 to these cases, is, that, considered in connection with Section 2, it does show that Section 2 was intended to apply to "place" lands only, since "granted lands" were the only lands referred to as "conveyed herein", and the words "granted lands" do not include "indemnity" lands. (Appellees' Original Brief Nos. 164, 165, pp. 31-40.)

SECTION 5.

Section 5 of the act gives the Secretary of the Interior authority to make rules to carry into effect the provisions of the act, but, whatever he attempted thereunder, it certainly does not authorize the Secretary to create tribunals to adjudicate the vacation of outstanding patents—as to which the jurisdiction of the Interior Department has ceased.

United States v. Stone, 2 Wall., 525, 535.

United States v. Schurz, 102 U. S., 378.

Stimson v. Rawson, 62 Fed., 426.

Noble v. Union River Logging Co., 147 U. S., 165.

Bickness v. Comstock, 113 U. S., 149.

Beley v. Naphtala, 169 U. S., 353.

Moore v. Robbins, 96 U. S., 530.

Gibson v. Chauteau, 13 Wall., 92.

Nor does the authority to make rules give to the Secretary the right to set aside previous decisions as to matters of fact, upon and in faith of which previous decisions vested rights have accrued.

Johnson v. Drew, 171 U. S., 93.

Gertgens v. O'Connor, 191 U. S., 237.

Logan v. Davis, 233 U. S., 623.

United States v. Minor, 144 U. S., 233.

Burke v. So. Pac., 234 U. S., 669.

Barden v. Nor. Pac., 154 U. S., 288.

Davis v. Wiebold, 139 U. S., 507.

Smelting Co. v. Kemp, 104 U. S., 636, 640.

Shaw v. Kellogg, 170 U. S., 312, 339.

Knight v. United States Land Ass'n., 142 U.S., 161, 176.

CERTAIN IT IS SECTION FIVE GIVES NO RIGHTS TO SETTLERS.

SECTION 6.

Section 6 confirms the patents for lands "conveyed herein that have already been issued", but requires the provisions of Sections 2, 3, 4 and 5 to be applied to the previously patented lands and that the Secretary shall protect "any and all settlers on said lands and all their rights under the said sections of this act."

The words "patents for the lands conveyed herein that have already been issued" limit the section to the "lands conveyed herein" are the "granted lands" ("place") as distinguished from the "lieu lands" ("indemnity").

We have also just seen that the issuance of a patent is a conclusive adjudication of the fact of possession or occupancy and, that, thereafter, the jurisdiction of the Secretary of the Interior thereover has ceased.

We take it as conclusive that any interpretation of this section is erroneous which directs the Secretary of the Interior to do that which the law prohibits. Equally impossible would be an interpretation which would require that which is vain or futile—such as "vesting" rights in the settler in one section and "vesting" conflicting rights in the patentee in another, then in the last section requiring the Secretary of the Interior to "protect" the former against the latter. Nor is it admissible to construe an act so as to make it inconsistent within itself and with the general law. The con-

trary is a fundamental principle of interpretation. We can offer but two consistent constructions:

1. If the settlers obtained no preferential rights under Sections 2, 3 or 5 of the act, Congress must have intended by Section 6 to safeguard their right to purchase the land as provided in Section 4 and, as to lands to be subsequently patented and within the "place" or primary limits of the grant, to direct the Secretary in Section 6 to see that such lands were excepted from the grant, where the necessary facts were established and the settlers rights to purchase or to enter under the public land laws were secured.

2. Or on February 8, 1887, patents had been issued to the Railroad Company for both "place" and "indemnity" lands, which fact was presumably within the knowledge of Congress. Now, Congress by Section 2 conveys the title of the United States to the "lands granted" (saying nothing about "indemnity" lands) with an exception out of "said lands" (out of "lands granted") of all lands occupied by actual settlers, etc. Then by Section 6 it confirms prior patents to "the lands conveyed herein", with a like exception, as the phrase "but the Secretary, etc.", in Section 6 has practically the same effect as the proviso of Section 2.

Either of the constructions suggested, and only one of the two, give effect to the entire act. Any other would seem to result in the law being read as if it would confirm the title in one phrase and withdraw that confirmation in another and make it the duty of the Secretary to enforce both interests.

(a) Results necessarily following from this interpretation of the statute:

If the Act of 1887 has no application to the "indemnity" lands, the proceedings in Nos. 164 and 165 must be affirmed. In No. 166, the north eighty of the land claimed cannot be affected by this act since it was private property at the date of the act and the owner of the title did not assent to the act and could not have purchased with notice of an unenacted statute. As to this eighty, the title must be adjudicated exactly as if the Act of 1887 had no existence, and when so adjudicated, the rights of the Railroad Company are conclusively shown to have vested in this land in 1871. The settler having taken possession of withdrawn lands, necessarily as to this eighty the case must be affirmed. As to the south eighty in Case 166, the case conclusively shows that the settler never had any possession sufficient to justify a homestead entry. His residence was on privately owned land, not on the land in question, and therefore, under no circumstances could be regarded as an actual settler on this eighty. An actual settlement is necessary to bring the Act of 1887 into operation. *Therefore No. 166 must be affirmed. All three cases rest with defendant-appellees on the merits.*

2. CAPACITY OF THE UNITED STATES TO MAINTAIN THESE SUITS.

This issue was raised *in limine* by plea.

It seems to be conceded in the Government's brief that the right of the United States to sue exists only where it has a direct interest or an obligation to the public, or an obligation to the individual. In *this* case, the United States certainly has no interest of its own, and it claims none. In fact, its brief, on page 2, expressly states that the bill was

to enforce the rights of certain settlers, and in no part of the case, either pleadings or briefs, does the United States claim any interest in this land for itself. It is not shown, nor can it be, *that the public has any interest in this controversy.* No such interest is alleged in the bill, shown in the record, or asserted in the brief. The claimants had no interest which the United States was bound to recognize and protect. No obligation rested upon the United States to recognize or protect the claimants unless such claimants complied with the law. This none of them ever did. In the *Grant case*, the claimant did not establish a residence upon any of the land affected by this act. In none of the cases did the intervenors file claims under the homestead act prior to the vesting of the title in the Railroad Company. In none of the cases did the claimant file homestead entry within the time limited therefor under the Act of May 14, 1880. In none of the cases, as we have shown in our original briefs (Nos. 164, 165, p. . . . ; No. 166, p. . . .) was there at the time of the settlement a *bona fide* intention to make homestead entry, which intention was expressly required by the Act of May 14, 1880. For these reasons, as against the *United States*, the claimants had acquired no rights which the United States was bound to protect or bound to recognize. The United States, when it patented these lands to the Railroad Company, in effect said to these settlers: You did not comply with the law, therefore you have no right. While it may be true that the United States would have a right to waive these failures to comply with the statute, and while it may be true that the railroad company cannot make an objection on that score while the

United States makes none, yet in this case, the effect of the granting of the patent was to make such an objection on the part of the United States, and the United States having once so acted, it ought not to be allowed now to withdraw from the position which it has once assumed. **Having neither an interest of its own, an obligation to the public, nor an obligation to these claimants, the United States should leave the parties to protect their own rights.**

United States v. San Jacinto Tin Co., et al.,
125 U. S., 273.

United States v. Lamm, 149 Fed., 583.

Lynch v. United States, 13 Okla., 146, S. C.,
73 Pac., 1097.

United States v. Stinson, 197 U. S., 204.

Curtner v. United States, 149 U. S., 671.

United States v. Mo., etc. Ry., 141 U. S., 381.

United States v. Des Moines Val. R. Co., 84
Fed., 43.

United States v. Choctaw R. Co., 3 Okla., 474,
S. C., 41 Pac., 752.

3. PRESCRIPTION, LIMITATION AND CONFIRMATION.

These issues, based not only on the protection afforded a good faith purchaser, without notice, at common law, but also upon specific statutes (Act March 3, 1887, 24 Stat. L., 556, ch. 376; Act March 3, 1891, 26 Stat. L., 1093; Act March 2, 1896, 29 Stat. La., 42, ch. 39), were raised in limine by plea.

Admittedly if properly plead and applicable any one or all of the issues thus presented disposes of these cases, irrespective of the issues involved on the merits.

(a) "The suits are to establish title by enforcing an exception rather than to vacate and annul patents." (Government's Brief, pp. 25, 41.)

The argument made in the Government's brief that this is not a bill to cancel and annul a patent more than six years old but a bill to enforce an exception, is like the peace of God in that it passes all human understanding. In the bills, paragraphs 1, 8 and 10, the only relief prayed or suggested is the cancellation and annulment of the patent, or the holding of the record owner as trustee for the settlers. It is true that under the general rules of equity, under a prayer for general relief such relief as is appropriate to the case may be granted even though not specially prayed for, *but in those cases no relief can be granted to either party plaintiff without setting aside, cancelling and annulling these patents*, and if the Court is to construe the limitation act as suggested in this case, there will be nothing left of it, since no case can be imagined in which the claim cannot be made that a bill to set aside a patent is not a bill to enforce an exception. There could be no possible case suggested for the purpose of annulling a patent in which it might not be claimed as successfully, as in this case, that the lands patented were excepted from the grant. If they were not so excepted, necessarily the patent would be valid.

The case of *Leavenworth v. United States*, 92 U. S., 733, is not in point on this question. That was a bill to vacate an erroneous certification to the State of Kansas. The case

was decided in 1875, and the statute of limitations was not passed until 1896. The question of the effect of the statute of limitations had, therefore, nothing to do with the case.

The same is true of the case of *Lee Wilson & Co. v. United States*, 245 U. S., 24. In that case the Court expressly says that the land was "not embraced in the selection", was "not included in the township", and "did not pass by the patent" or the "selection" independently considered, and that the land did not "pass to the State by the Act of 1898." As the patent referred to the survey, which excluded the land in question, the patent did not describe or convey the land; also, the land was unsurveyed, therefore not "public" when the patent issued. Where land not described in a conveyance is sought to be recovered, under no sense of the term can the bill be said to be one to cancel a patent since there is no patent of the particular land involved.

In the case of the *Ore. & Cal. R. R. Co. v. United States*, 238 U. S., 393, Mark Norris, Esq., of counsel here, was counsel for the largest of the purchasers from the railroad company referred to in that case, and naturally is familiar with it. In that case there was absolutely no attempt whatever to set aside patents. The patents were conceded to be good. There was in the grant a covenant that the railroad company after obtaining title by patent would sell the lands to a particular class of persons and for a certain price. This covenant the railroad violated and the Court held that the United States could enforce it according to its terms. There was no attack made upon the validity of the patents and no question of limitations entered into the case.

The opinion of Attorney General Gregory in the appendix certainly is not in point. The case there stated shows that the Land Department had no jurisdiction to determine the facts. The statute under which action was had expressly withheld such jurisdiction, and the certificate therefore on its face, read in connection with the statute, conveying nothing.

This contention that these suits are to enforce an exception and not to cancel the patent was not raised below. It is in conflict with the petition, and, we submit, is not well taken.

Patently an afterthought of argument, the Attorney General seeks thereby to carry the effort to restrict the effect of these statutes intended to give sanctity and repose to titles based on patents of the United States, one step further, and to effect what will be tantamount to a judicial repeal of the statute altogether.

That it is not within the province of this Court to do. The effect of the statute was to perfect the title. The limitation undoubtedly bars any cancellation by the United States:

United States v. Chandler, 209 U. S., 447.

Burke v. So. Pac., 234 U. S., 669, 693.

Appellee's Original Brief Nos. 164, 165, pp.
26-30.

The ruling in the *Chandler* case, that the statute affects the right even if only directed against the remedy and makes the patent have the same effect, as if valid in the first place, was specifically affirmed in a very recent case—
United States v. Whited and Wheless, Ltd., 246 U. S., 552,

where an action to recover money damages because of deceit practiced in procuring a patent under the Homestead Law was held not to be barred by this statute. In referring to the *Chandler-Dunbar case* this Court said:

"But that is merely an emphatic way of saying that the title is made good. It does not import that the collateral effects of fraud in obtaining the patent are purged. The element of bad faith or fraud was expressly excluded."

This is an express and recent affirmation of our position here.

(b) "Lands are not public lands in statutory sense." (Government Brief, p. 46.)

This was the main contention of the Government in both the District and Circuit Courts. It was rejected squarely in both tribunals.

Not only is this statement contrary to the proviso in the Act of 1887, but it is alleged in Paragraph 2 of all of the bills and admitted in Paragraph 2 of all of the answers that the lands were part of the public domain at the time they were patented.

In *Barker v. Harvey*, 181 U. S., 490, the Court said:

"As between the United States and the Indians, their failure to present their claims to the Land Commission within the time named, made the land, within the language of the statute, part of the public domain of the United States. 'Public Domain' is equivalent to 'public lands,' and these words have acquired a settled meaning in the legislation of this country. The words 'public lands' are habitually

used in our legislation to describe such as are subject to sale or other disposal under general laws."

We refer to the full discussions of the effect of the Act of February 8, 1887, in both appellees' original brief and, *supra*, herein.

The *Froyseth* and *Trodick* cases have been the mainstay of the Government's position throughout. In the cases of *Osborne v. Froyseth*, 216 U. S., 571; *No. Pac. v. Trodick*, 211 U. S., 705, and *R. R. v. Amacker*, 175 U. S., 564, cited in the brief, there was no question whatever raised about the statute of limitations. It was not pleaded and the question of whether when a patent has been validated by the statute of limitations as against the United States it is not also validated against everyone claiming under the United States, has never been decided unless possibly the decision in the *Burke* case may be held to have so decided.

In the *Burke* case, 234 U. S., 669, 693, it was practically held that where the rights of the claimant originated after the patent, the patent was conclusive. In these cases the rights of the claimants did not attach until after the patent. In the *Chandler* case and the *Whited & Wheeles* case, both of which are in our original brief, the Court says that the statute makes the patent good. If the patent is good against the United States, it ought to be good against the world.

(B) LACHES.

The method by which the Government seeks to avoid the effect of the lapse of more than a quarter of a century between the issuance of the patents and the filing of these suits, is ingenious.

No equitable relation between the record owner—patentee—and the alleged holder of the legal title is admitted—either at the time of the issuance of the patent or at the time of the passage and acceptance of the act upon which the claimants now rely. The necessary effect of the alleged individual and preferential rights given the settlers by the Act of 1887 are said to be deferred until the Land Office has acted.

In avoidance of the lapse of a score of years of comparative inaction and seeming indifference after the final decisions in the Land Office, it is said that "the claimants * * * might then have resorted to a court of equity to establish their titles, they were not bound to do so." They had a right to rely upon the Government to whom laches can never be imputed.

If the apparent inconsistency of that attitude is not convincing it is urged that these settlers were justified in remaining in such fugitive possession as they had, swapping their "claims" about like jack-knives, permitting an industry, which furnished them livelihood to grow up about them, based on the validity of patents issued by the sovereign nearly thirty years previously—nursing their "*homestead claims*" until the timber on the lands became valuable—all on the theory that, the plain words of conveyance and description, to the contrary notwithstanding, they had the right to rely on the triple-barrelled idea that either the railroad patents did not purport to convey such lands, were to be regarded as utterly void, notwithstanding their apparent regularity, or that the patents were subject to a legal challenge which was never made.

These patents were certainly not "utterly null and void." They have, until set aside, the same dignity as any other patents. In our original brief, we have shown that United Stats patents are muniments of title of the very highest dignity. They are, of course, "subject to challenge in an action at law," just as any other deeds would be, for example for fraud if fraud were alleged, but such actions would be governed by the ordinary rules of limitation, and laches.

Their alleged rights under either the Act of February 8, 1887, or the subsequent action of the land office, were not sufficiently definite or preferential to give rise to a trust relation between the legal and equitable owners, but such rights were sufficiently definite and preferential to justify the claimants in regarding "the lands awarded them as excepted out of the grant as much as if in a deed it had been excluded from the conveyance by metes and bounds!" (Government brief p. 54.)

The rule that laches may not be imputed to a peaceable possessor is not applicable to these cases. In no one of the cases was there any such possession as would support the rule. (Appellees' original brief Nos. 164-5, pp. 22-24.)

The Louisiana Civil Code, Articles 3487, 3500, 3505 * provide that to constitute notice as against the record owner, so as to support prescription, possession must be "as owner." Such possession must also be definite, open, notorious, peaceable, public and unequivocal. The possession of these settlers was neither as owner nor under color of title. Nor was it otherwise sufficient. It was not actual. The homestead claim was for years after occupancy "*in animo.*" It was based on assignments of homestead claims, legally unassignable.

* 3487 (3453-2229). To enable one to plead the prescription treated of in this paragraph, it is necessary that the possession be distinguished by the following incidents:

1. That the possessor shall have held the thing in fact and in right, as owner; when, however, it is only necessary to complete a possession already begun, the civil possession shall suffice, provided it has been preceded by the corporal possession.
2. That the possession shall have been continuous and uninterrupted, peaceable, public and unequivocal; a clandestine possession would give no right to prescribe; but he who possesses by virtue of a title cannot be considered as a clandestine possessor, for his title leads to the supposition that the possession commenced in good faith, and that is sufficient to enable him to plead prescription.

3500 (3466). The possession on which this prescription is founded must be continuous and uninterrupted during all the time; it must be public and unequivocal, and under the title of owner.

3505 (3471). All the rules established in the preceding paragraph with regard to the prescription of ten years, are applicable to the prescription of thirty years, except in the provisions contained in the present paragraph, which are contrary to or incompatible with them.

It is urged that these settler-claimants should be tenderly dealt with. The fact is that the Government has been indeed tender in protecting the so-called rights of these settlers.

1. By partially forfeiting the rights of the patentees by Congressional action—a proceeding of exceedingly doubtful legality—which has not yet been sanctioned by the Courts.
2. By the passage of the various acts extending the existing Statutes of Limitation in their favor.
3. By instituting suit No. 16 in Equity, which, however, includes none of the lands involved in these suits.
4. By lending its power to the prosecution of the present suits and appeals.

We know of no law which guarantees to "actual settlers" or "squatters" more than the "equal protection of the laws," which the Constitution guarantees to all citizens of the United States.

We know of no law or principle of equity which guarantees to this especial class an extraordinary protection of the law, or immunity from its equal operation.

(C) THE DEFENCE OF *BONA FIDE PURCHASER.*

The Government fails to distinguish the *bona fides* as determined by the general rule (*Krueger v. United States*, 246 U. S., 69, 78, cited p. 56, Government's brief), and the *bona fide* applicable and plead in these cases.

The *Krueger case, supra*, has nothing to do with any construction of the defendants *bona fides*. Such is to be measured, not solely by the general rule but also by the statutes plead.

We contend that the burden has been fulfilled and the affirmative showing made is sufficient to satisfy the rigid requirements of even the common law, but, certainly, more than sufficient to bring these appellees within the statutory requirements as defined by the Supreme Court. (Appellees' original brief No. 166, pp. 45-51.)

Abundant evidence was taken on this point; and it is conclusively proven that these third possessors bought *after examination of title* by able counsel, and paid a fair consideration for their purchases. (Depositions of Pack R., 129; Green R., 158; Nicholson R., 172.)

In any event the most that can be claimed for the settlers amounts to no more than constructive notice.

In the *Winona case*, 165 U. S., 463, 480, and the cases which followed it, this Court held squarely that constructive notice is not notice under the acts confirming the titles of good faith purchasers under railroad grants. These are the cases which apply here and not the line of authorities cited by the Government.

As to the Government's position (Brief p. 57) that the situation is not altered as to the 80 acre tract in Case No. 166, which was sold on August 3, 1886, because of the liability of the grant of 1871 to forfeiture for breach of a condition subsequent, we refer to the Original Brief filed by us in that case, pp. 13-40, where it is conclusively shown that the patent was properly issued and the land disposed of for value by the patentee prior to any confusing legislation on the subject. The Government's contention that such a purchaser took with notice that the Act of February 8, 1887, because at the time of taking a forfeiture was a possibility, is an erroneous statement of both the fact and of the law and the cases cited do not support the contention.

In the case of *New Orleans Pacific Ry. Co. v. United States*, 124 U. S., 127, 129, the Court considered the effect of the statute passed in 1876 providing that railroad land grant lands should not be patented until the railroad had paid the expenses of the survey. This Act of 1876 was passed at a time when the Railroad Company was in default, the road not having at that time been constructed in accordance with the grant, that is, within the five year limit. The Court, therefore, held that inasmuch as the United States might have forfeited the grant for non-performance at that time, it had a right to annex additional conditions to the patenting of the lands. The principle there decided was affirmed in the other two cases cited. In the case at bar, however, the purchasers bought after the railroad company had completed the road and therefore at a time when the Government no longer had the right to forfeit the grant. *Schulenberg v. Harriman*, 21 Wall., 24 (cited on pages 17 and 31 of brief in case No. 166).

No serious attack was made on the trial upon the good faith of these appellees, and practically no evidence was offered or attempt made to dispute the same.

IV. ERRONEOUS STATEMENTS OF FACT IN THE ORIGINAL BRIEF FILED BY THE GOVERNMENT ON OCTOBER 8, 1918.

Page 2, top of page. It is stated that the N. O. P. Railroad Company is assignee under the Act of February 8, 1887.

There never was any question but that the N. O. P. was legally assignee under the deed of 1881.

Page 2, third paragraph. It is stated that the bill is to enforce the rights of certain named settlers on the lands under the Act of 1887.

Our contention is that no rights were given to these settlers under that act.

Page 2, paragraph 4. A claim is made that the lands were excepted from the grant by reason that settlements were made by the claimants before definite location, and continuous possession thereafter.

In the *Grant case*, No. 166, the settlement of the claimant was made after definite location, even the location of 1882, and in the *Brown case* there was no continuous possession thereafter, the record showing that Mrs. Brown practically had no possession for a number of years.

Page 3, next to the last paragraph. The statement is made that no question relating to the merits of the suit was decided by the Court of Appeals.

This is incorrect as an examination of the decisions of that Court will show. Certainly laches is a very meritorious defense.

Page 17. The statement is made that all of the conveyances of the lands in question were prior to the Railroad Company's agreement of 1892, except 120 acres of the tract in No. 164, which was made June 28, 1900.

This is an erroneous statement of fact. The conveyance of June 28, 1900, was upon foreclosure of a mortgage which the Railroad Company had given long prior to 1892.

Page 18. The matter of sales by the Railroad Company is incorrectly stated. It is apparently intended by the statements here made to give the Court to understand that the defendant River Land & Lumber Company acquired the lands June 13, 1890, and that the Pickering Lumber Company acquired June 28, 1900. The dates given are the dates of the sales to Brewster and the Kisatchie Land Company respectively.

Page 18, paragraph Land Department proceedings. Jasper J. Brown is spoken of as the intervenor. The intervenor was his widow, Josephine Brown.

Page 19. That Jasper J. Brown took possession of the land in question in 1881, made a settlement thereon, and has occupied and possessed same ever since.

The facts as shown by it record aver that, as to the NE $\frac{1}{4}$ of NW $\frac{1}{4}$ Section 13, Brown never did occupy, possess, cultivate or live on it.

In 1881, he partially belted three or four trees on it, did not even fell or kill them and did no further act of domain on it from that day to this. (Case 164, Test McKnight, R.,

215; Stevens, R., 221 and 228; Stokes, R., 223; Map, R., 287.) There was nothing on file at Washington or elsewhere to show that Brown ever claimed this forty until after it had passed into third hands.

The belting of these three or four trees, followed by no other evidence of intent to exercise dominion, cannot in any sense be construed as notice of intent to homestead or otherwise claim this forty.

Page 20. The date given for the sale to the W. R. Pickering Lumber Company is that the company's sale to S. H. Mallory.

Page 22. The dates given for the sales to the Southland Lumber Company and the W. R. Pickering Lumber Company are those of the sales to Granger and A. C. Brown.

Page 25. Statement is made that the Act of February 8, 1887, reserved from the grant the lands in question for the benefit of the intervenors. (Legal conclusion stated as fact.)

V. CONCLUSION.

The case of *Weeks v. Bridgman*, 159 U. S., 541, is repeatedly cited in the Government's brief as affirming the proposition that where a statute contains an exception, a patent issued under that statute must be construed to contain the same exception on its face: *Weeks v. Bridgman* is wholly different from the case at bar. In that case there was no patent, but the certification of the selection lists made by the State was by statute given a certain limited effect. This statute is quoted on page 547 of the report and provides that the lists

"shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such Act of Congress and intended to be granted thereby, but where the lands embraced in such lists are not of the character embraced by such Acts of Congress, and are not intended to be granted thereby, said lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim or interest shall be conveyed thereby."

The argument based upon this case is to the effect that our patents are void on their face, and therefore assailable at law or in equity. This, however, is incorrect law. No patent is void on its face where evidence outside of the record is required to produce the exception.

See *Smelting Co. v. Kemp*, 104 U. S., 644, 646, 647, and the cases which have followed it.

That case lays down this law: that a United States patent cannot be attacked collaterally or directly at law except where it is void on its face, and that where matters of fact must be determined before the patent can issue, the decision of the Land Office in awarding the patent is a conclusive determination of the existence of the matters of fact necessary to the validity of the patent and that matters of fact so determined cannot be re-examined by the Courts.

On page 40 of the Government brief, *Mo. Kans. & Tex. v. U. S.*, 235 U. S., 37, 41, is cited upon the point that a granting act is construed against the grantee. The authorities cited above show that this rule does not apply to provisos, and on reason it certainly ought not to apply to provisos.

The respect that is due to a Government patent, which is a title direct from the sovereign, the presumption that all the preceding steps required by law were duly observed before the same was issued, and the obvious necessity for stability in titles resting upon these official instruments, require that in suits to annul them, the Government shall bear the burden of proof and shall sustain it by that class of evidence which commands respect, and that amount of it which produces conviction.

Maxwell Land Grant Case, 121 U. S., 325, 379-381.

U. S. v. Iron Silver Mining Co., 128 U. S., 673-676.

U. S. v. Stinson, 197 U. S., 200, 204, 205.

U. S. v. Clarke, 200 U. S., 601-608.

It is submitted that the evidence in these cases does not measure up to the requirements stated, but, on the contrary, they are typical of the "fugitive and uncertain testimony relative to settlement and occupancy" that the Supreme Court had in mind in prescribing those requirements.

The alleged claims of the settlers whose rights are voiced by the Government in these cases are antedated by the right of the Railroad Company. Their alleged occupancy of these lands and an intention to claim them under the public land laws in each instance is subsequent to withdrawal provided for in the railroad grant, and the United States Supreme Court

"has decided in a number of cases * * * that this withdrawal operated to exclude from sale, purchase or pre-emption all the lands in controversy."

Ballard v. Des Moines Ry., 122 U. S., 170.

Riley v. Wells, 154 U. S., 578.

Wolcott v. Des Moines, 5 Wall., 681.

There is no allegation or contention anywhere made that these withdrawals were void, and, as the Supreme Court says, in *U. S. v. Mid-West Oil Co.*, 236 U. S., on page 477, speaking of a similar withdrawal:

"The withdrawal was made in 1851. The hoped-for legislation was not passed until several years later. Between those dates various private citizens made settlements by which, under various statutes they initiated rights and acquired an interest in the land * * * if the withdrawal of it was void. But, by such settlement, they obtained no rights if the withdrawal of it was valid."

Cook v. Tullis, 18 Wall., 338.

Salt Lake Inv. Co. v. Oregon Short Line, 246 U. S., 446, 449:

In this case the Court considered a conflict between a pre-emption patent and a railroad grant made after settlement and filing. The land was within a town-site limits, however, and noting the exception of such land from the pre-emption statute, the Court maintained the railroad title, holding:

"Applying these views, we think Macduff's settlement and declaratory statement under the pre-emption act were of no effect. They neither conferred any right on him nor took any from the Government. His claim was not merely irregular or imperfect, but was an impossible one under the law, and so the status of the land was not affected thereby. The

land continued to be subject to the disposal of Congress and came within the terms of the right of way as much as if he were making no claim to it. Of course, the presence on public land of a mere squatter does not except it from the operation of such an act containing, as here, no excepting clause."

The Act of February 8, 1887, on which these claims are based, we believe we have shown does not apply to "indemnity" lands; does not apply to lands for which patents were issued prior to the date of that act; and, as to "place" lands patented subsequent thereto (here only the south eighty acres in No. 166), there were no such settlements or "actual settlers" in the occupancy of such lands as would operate, without a filing or entry, to exclude the same from the operation of the confirmatory act. In the language of the United States Supreme Court, in the case of *Oregon & California R. R. v. U. S.*, 238 U. S., 434:

"The public-land laws had test of the qualification of the settlers under them; they also had the machinery of proof and precaution. When the granted lands were withdrawn from those laws and primarily devoted to another purpose they were committed to another power, to be administered for such purpose, and a discretion in the exercise of the power, within the restriction imposed, was necessarily conferred. This purpose we have sufficiently estimated. Nor need we pause to consider the differences between charitable and other trusts, the class, not individual interests, which the former must have, as it is contended, and the certainty in the beneficiaries which the cases have assigned to the latter. And certainly the words 'actual settlers' indicates no

particular individuals. They describe a class or body of individuals without habitation or name.
* * * We cannot construe the grants as confined or encumbered by rights so indefinite."

Is not the language used applicable here. Congress reserved from the grant lands under certain conditions, which conditions, being non-existing, had no effect on patents previously issued or upon "indemnity" lands. Even if it be held that the conditions did exist as to granted lands for which patents were issued subsequent to the acceptance of the Act of February 8, 1887, by the Railroad Company, the whole effect of exception provided for in that act was to retain the lands in the public domain. No trust was created for ever a qualified settler until he complied with the requirements of the law, and the words "actual settler" within the meaning of the homestead law, as has been heretofore shown, signifies not a contemplated or possible compliance with the law, but an actual compliance.

In none of the cases before the Court was there any such compliance, or even an attempt, until years after the title to the Railroad Company had vested.

The decrees appealed from are correct and should be affirmed. We so respectfully pray.

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December, 1918.



U. S.
FILED

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JAMES D. MAHER,
CLERK.

UNITED STATES OF AMERICA.

THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, Complainant,
and STEPHEN N. GRANT,
Intervenor, Complainant,
Appellants,
vs.

In Equity.
October Term, 1918.
No. 166.

NEW ORLEANS PACIFIC RAILWAY
COMPANY, W. R. PICKERING
LUMBER COMPANY and SOUTH-
LAND LUMBER COMPANY,
Defendants and Appellees.

BRIEF FOR DEFENDANTS W. R. PICKERING LUMBER COMPANY AND SOUTHLAND LUMBER COMPANY.

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H. H. WHITE,
J. G. PALMER,
F. G. HUDSON,

Solicitors and of Counsel for
Defendants and Appellees,
W. R. Pickering Lumber
Company and Southland
Lumber Company.

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UNITED STATES OF AMERICA.

THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, Complainant,
and STEPHEN N. GRANT,
Intervenor, Complainant,
Appellants,

vs.

NEW ORLEANS PACIFIC RAILWAY
COMPANY, W. R. PICKERING
LUMBER COMPANY and SOUTH-
LAND LUMBER COMPANY,
Defendants and Appellees.

In Equity.
October Term, 1918.
No. 166.

BRIEF FOR DEFENDANTS W. R. PICKERING
LUMBER COMPANY AND SOUTHLAND
LUMBER COMPANY.

I.

This was a bill, filed by the United States, January 21, 1915 (R. 13), to cancel and annul its land patent issued March 3, 1885, or, if cancellation is refused, to have the appellees, W. R. Pickering Lumber Company and Southland Lumber Company, the present holders of the patent title, declared to be trustees for the intervening appellant Grant, and to compel conveyance to him. (R. 12, 13.)

After the bill had been filed, and on May 13, 1915 (R. 48), by the suggestion of the complainant (R. 156), Grant intervened and prayed that the appellee lumber companies be declared trustees for and compelled to convey to him. (R. 47.)

The ground on which appellants ask this relief is that the patent was *erroneously* issued. (R. 8.) They allege the lands involved were, by Section 2 of the Act of February 8, 1887 (24 Stat. 391), excepted from the grant (R. 9), and that the Intervenor Grant, who had entered into possession of a portion of the premises (R. 198) involved on February 9, 1886 (R. 131), and attempted to make homestead entry thereof December 20, 1890 (R. 161), was entitled to the same as against the Government and the appellees. *No fraud is alleged or attempted to be proved.* There was decree, in District Court, for defendants, November 6, 1915. (R. 233.) Complainant and intervenor appealed. The Court of Appeals affirmed the decree October 3, 1916, and denied rehearing November 4, 1916. (149 C. C. A. 153.)

II.

The appellees contend:

1. That the patent sought to be vacated was not erroneously issued, and hereunder:

A.

That the patent was rightly issued under the definite location of 1871.

B.

That the patent was rightly issued under the so-called definite location of 1882.

C.

That the patent was rightly issued because Section 2 of the Act of February 8, 1887, has no application to the lands in dispute, and hereunder:

- (a) That Section 2 applies only to "place" lands to which the United States released title by Section 2 of the Act of February 8, 1887. The lands in question are "place" lands, but they were not lands to which the United States released title by Section 2.
- (b) Section 2 has no application to the South half of the Northwest quarter of Section 3, Town 3 North, Range 7 West, being the North half of the lands claimed (and the part on which is Intervenor's residence), because prior to the passage of the Act of February 8, 1887, this eighty acres had been sold and deeded by the Railroad Company to one Granger. The act, therefore, could not apply to this eighty as a statute, since Granger's rights could not be legislated away without his consent. The act could not apply as a contract between the United States and the Railroad Company, since the Railroad Company, having parted with its title, could not contract away what it did not own.
- (c) The act does not apply to the Northwest quarter of the Southwest quarter of Section 3, Town 3 North, Range 7 West, because neither the Intervenor Grant nor his assignors ever had any possession thereof.
- (d) Nor does it apply to the last mentioned forty or to the Northeast quarter of the Southwest quarter for the reason that the Intervenor Grant's residence was never on either of them.

D.

No error in the patent is established by any competent evidence, and hereunder:

(a) Possession is a question of fact and the decision of the Land Office is unassailable except for fraud, which is not charged or shown.

(b) Neither the United States nor the Intervenor are in a position to assail the patent. They lack interest and are guilty of laches.

2. That if the patent was erroneously issued it has since become valid.

A.

By statutes of limitation.

B.

By congressional confirmation to the present holders of the patent title, they being good faith purchasers.

3. The exception from the grant, if such there be, extends only to lands actually occupied from November 17, 1882, to February 8, 1887; not to lands the sole occupation of which was in the mind of the Intervenor during that period.

4. The Act of February 8, 1887, expressly confirmed the patent in question. The only right it gave Grant under any circumstances was to purchase the land owned by the Railroad Company under the provisions of Section 4 of the act. This Grant never attempted to do.

III.

At the time of making this brief, counsel for the appellees have not received appellants' brief. We, therefore, briefly set out the facts; stated in chronological order.

Prior to 1871 the lands involved were "public" lands

open to entry, and a Land Office at which entry could be made existed and was open from 1871 down to the present time. (R. 78, A. 5. 6.)

March 3, 1871, by Section 22 of the act of that date (16 U. S. Stat. 573), Congress made a land grant to the New Orleans, Baton Rouge & Vicksburg R. R. Co., a Louisiana corporation, organized to build a railroad east of the Mississippi from New Orleans to Baton Rouge, thence west of the River via Alexandria to a connection with the Texas Pacific at Shreveport. We quote this grant:

"That the New Orleans, Baton Rouge and Vicksburg Railroad Company, chartered by the State of Louisiana, shall have the right to connect by the most eligible route to be selected by said Company with the said Texas Pacific Railroad at its eastern terminus, and shall have the right of way through the public land to the same extent granted hereby to the said Texas Pacific Railroad Company; and in aid of its construction from New Orleans to Baton Rouge, thence by the way of Alexandria, in said State, to connect with the said Texas Pacific Railroad Company at its eastern terminus, there is hereby granted to said company, its successors and assigns, the same number of alternate sections of public lands per mile, in the State of Louisiana, as are by this act granted in the State of California, to said Texas Pacific Railroad Company; and said lands shall be withdrawn from market, selected, and patents issued therefor, and opened for settlement and preemption, upon the same terms and in the same manner and time as is provided for and required from said Texas Pacific Railroad Company, within said State of California; Provided, that said company shall complete the whole of said road within five years from the passage of this act."

We also quote prior sections of the same act referred to in Section 22.

"Sec. 9. That for the purpose of aiding in the construction of the railroad and telegraph line here-

in provided for, there is hereby granted to the said Texas Pacific Railroad Company, its successors and assigns, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as such line may be adopted by said company, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad in California, *where the same shall not have been sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed.* In case any of said lands shall have been sold, reserved, occupied, or preempted, or otherwise disposed of, other lands shall be selected in lieu thereof by said company, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections first above named, and not including the reserved numbers. If, in the too near approach of the said railroad line to the boundary of Mexico, the number of sections of land to which the company is entitled cannot be selected immediately on the line of said railroad, or in lieu of mineral lands excluded from this grant, a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections nearest the line of said railroad may be selected as above provided; and the word "mineral", where it occurs in this act, shall not be held to include iron or coal: Provided, however, that no public lands are hereby granted within the State of California further than twenty miles on each side of said road, except to make up deficiencies as aforesaid, and then not to exceed twenty miles from the lands originally granted. The term 'ship's channel', as used in this bill, shall not be construed as conveying any greater right to said company to the water front of San Diego bay than it may acquire by gift, grant, purchase, or otherwise, except the right of way, as herein granted: And provided further, that all such lands, so granted by this section to said company, which shall not be sold, or otherwise disposed of, as provided in this act, within three years after the

completion of the entire road, shall be subject to settlement and preemption like other lands, at a price to be fixed by and paid to said company, not exceeding an average of two dollars and fifty cents per acre for all the lands herein granted."

"Sec. 12. That whenever the said company shall complete the first and each succeeding section of twenty consecutive miles of said railroad and put it in running order as a first-class road in all its appointments, it shall be the duty of the Secretary of the Interior to cause patents to be issued conveying to said company the number of sections of land opposite to and coterminous with said completed road to which it shall be entitled for each section so completed. Said company, within two years after the passage of this act, shall designate the general route of its said road, as near as may be, and shall file a map of the same in the Department of the Interior; and when the map is so filed, the Secretary of the Interior, immediately thereafter, shall cause the lands within forty miles on each side of said designated route within the Territories, and twenty miles within the State of California, to be withdrawn from preemption, private entry, and sale: Provided, however, that the provisions of the act of September, eighteen hundred and forty-one, granting preemption rights, and the acts amendatory thereof, and of the act entitled, 'An Act to secure homesteads to actual settlers on the public domain', approved May twenty, eighteen hundred and sixty-two, and the amendments thereto, shall be, and the same are hereby, extended to all other lands of the United States on the line of said road when surveyed, except those hereby granted to said company."

The grant was accepted by the grantee. This vested the right of the Railroad Company in the "place" land as a float. November 11, 1871, the Railroad Company filed its general route map as required by the grant. (R. 78.) The same was accepted by the Secretary of the Interior. (R. 78.) This was the only map required to be filed. (16 U. S. Stat. 573, Sec. 12.) And thereupon the specific "place" lands vested in the Railroad Company

subject to be divested by forfeiture for non-performance. (Missouri, Kansas & Texas vs. Cook, 163 U. S. 491.)

November 29, 1871, the "place" lands were "withdrawn from preemption, private entry and sale" (16 U. S. Stat. 573, Sec. 12). This order was filed in the local land office December 20, 1871. (R. 78.)

In January, 1877, one Thomas J. Killen squatted on the Southeast quarter of the Northwest quarter of Section 3 and built thereon a house and barn. (R. 125-6.) We quote Killen's testimony as to his intention.

"Q. What was your intention relative to this land when you moved on it?

A. My intention was to have it as a home. Of course I aimed to save it when everything opened up, but at that time people did not care whether they had a deed to land or not. It was a free country.

Q. Did you intend to homestead the tract?

A. Yes, sir." (R. 126.)

This testimony was given in August, 1915.

Act of May 13, 1880 (21 Stat. Chap. 89, Sec. 3), providing that homestead entries, if the entry were made within thirty days after taking possession, should date from the original taking of possession.

December, 1880, Killen sold his "claim and improvements" to one Conerly and moved off. Conerly moved on. (R. 126-7.)

January 5, 1881, the New Orleans, Baton Rouge & Vicksburg Railroad Company assigned its rights and property under the grant to the New Orleans Pacific Railroad Company by deed. (R. 77.)

In the fall of 1881, Conerly, having failed to pay Killen, abandoned his possession and retransferred the "claim and improvements" to Killen. Killen moved on again. (R. 127.)

1881-1882 the railroad was constructed by the New Orleans Pacific Railroad Company. (R. 77.)

November 17, 1882, the so-called definite location map, mentioned in Section 2 of the Act of February 8, 1887, was filed by the Railroad Company and accepted by the General Land Office. This map was the map of *actual construction* filed by the Railroad Company with the inspecting commissioners after the completion of the road. The Land Office demanded of the Railroad Company a map of "definite location", while the granting act required no such map. The Railroad Company thereupon filed this construction map. (R. 77, Senate Ex. Doc. No. 31, 1st Sess. 48th Cong., pp. 77-82.)

November 8, 1883, the lands in question were selected by the Railroad Company. (R. 206.) They were "place" lands. (R. 79.)

March 3, 1885, the selection list was approved and patent issued. (R. 210, 81, 76.)

February 9, 1886, the Intervenor Grant, having purchased Killen's "claim and improvements", established his residence in the Killen house on the Southeast quarter of the Northwest quarter of Section 3. (R. 131.)

August 21, 1886, the Railroad Company sold and conveyed to John T. Granger the South half of the Northwest quarter of Section 3, being the North half of the lands in question, and included all land on which were any buildings. (R. 36, 37, 79 and map.) At that time there was no record claim and no visible possession on the Southwest quarter of the Northwest quarter, Grant's house being on the Southeast quarter of the Northwest quarter.

In the fall of 1886, Grant was informed that the land he had settled on was railroad land. (R. 137.)

February 8, 1887 (24 Stat. 391), the Act of Congress of that date, out of which this controversy has arisen.

March 3, 1887 (24 Stat. 556), the Railroad Adjustment Act, requiring railroad grants to be adjusted in accordance with the decisions of this Court.

April 20, 1887, the Act of February 8, 1887, was accepted by the Railroad Company, and under the provisions of Section 3 took effect.

June 23, 1888, the Northwest quarter of the Southwest quarter of Section 3 was sold and conveyed by the Railroad Company to one A. C. Brown. (R. 37, 79 and map.) There was then no record claim and no visible possession thereof.

April 1, 1889, the Northeast quarter of the Southwest quarter was sold and conveyed by the Railroad Company to S. H. Mallory. (R. 29, 79 and map.) At that time a part of this forty was under cultivation, although Grant's house was on the privately owned forty north of the same. (Map.)

July 30, 1890, the Northwest quarter of the Southwest quarter was sold and conveyed by A. C. Brown to Isaac Stephenson and others. (R. 37, 79 and map.) There was then no record claim and no visible possession on this forty. (Map.)

December 20, 1890, Grant filed homestead entry of the one hundred and sixty acres in controversy in the local land office. (R. 160.)

March 3, 1891 (26 Stat. 1093), first United States Statute of Limitations as to land patents.

April 6, 1891, contest in local land office between Railroad and Grant. At this time the lands had been patented and all of them had been sold by the Railroad Company. The owners of the title were not parties to this contest, nor were they notified thereof. Also, Grant's residence was and always had been on private land, so no homestead entry could be based thereon. The contest was decided in favor of Grant by the Register and Receiver. (R. 160-184.)

May 13, 1891, the railroad appealed to the General Land Office. (R. 160-184.)

August 3, 1892, the Railroad made an agreement to dismiss all its appeals and to recover from its grantees title to lands conveyed, which were claimed to be excepted from the grant and to reconvey the same to the Government. At this time the Railroad owned none of the land in question. (R. 158.) This agreement was never recorded.

February 26, 1896, the appeal having been dismissed, under the above agreement, the General Land Office decided the contest in Grant's favor and asked a reconveyance from the Railroad. The purchasers from the Railroad Company were at no time parties to this proceeding, nor were they notified of its pendency. (R. 160-184.)

March 2, 1896 (29 Stat. 42), the second United States Statute of Limitations relative to railroad land patents.

June 1, 1899, the Northwest quarter of the Southwest quarter was sold and conveyed to the Brown Lumber Company. (R. 37, 79.) There was then no visible possession thereof. (Map.)

April 16, 1898, the Northeast quarter of the Southwest quarter was sold and conveyed to one Fisher. (R. 30, 79.)

June 8, 1900, the Railroad Company reconveyed to the United States upwards of 5,000 acres of land, but not the lands in controversy. (R. 222.)

February 27, 1901, Suit No. 16 in Equity was begun by the United States against the New Orleans Pacific Railroad Company to annul the patent to these and other lands. The owners of the railroad title were not parties to this suit. The suit was never tried and no *lis pendens* ever filed. (R. 184.) No legal service of process upon the Railroad Company was had till 1904. (R. 185-187.)

December 30, 1901, the South half of the Northwest quarter was sold and conveyed to the Southland Lumber Company. Grant's house was on the east half of this.

There was no visible possession of the west half. (R. 37-8, 79, map.)

August 15, 1902, the Northeast quarter of the Southwest quarter was sold and conveyed to the Pickering Lumber Company. (R. 30, 79.)

February 17, 1903, the Northwest quarter of the Southwest quarter was sold and conveyed to the Southland Lumber Company. There was then no visible possession of this. (R. 37, 79, map.)

January 21, 1915, this suit was begun. (R. 13.)

May 13, 1915, Intervenor's petition filed. (R. 48.)

From February 9, 1886, down to the time of the filing of the bill, the Intervenor Grant lived with his family on the Southeast quarter of the Northwest quarter of Section 3, his house being on that forty. (R. 131-140.) He cultivated certain lands surrounding the house on the forty on which the house was situated, and also about ten acres on the Northeast quarter of the Southwest quarter. In 1913 and 1914 he cleared about two acres on the Southwest quarter of the Northwest quarter of Section 3. Prior to 1913 and 1914 there was no visible sign of possession on any of the west half of this claim, and there never was any residence on any forty except the Southeast quarter of the Northwest quarter. (R. 131-140, map.) Grant never had the lands claimed assessed to him or paid any taxes thereon. (R. 80.) See appendix.

IV.

The ground upon which it is asked that this patent be annulled is that it was *erroneously* issued, because it is alleged, and claimed to have been established by proof, that from November 17, 1882, down to February 8, 1887, the lands in question were "occupied by actual settlers, their heirs or assigns", and therefore were excepted from

the grant under the proviso of Section 2, Act of February 8, 1887. (24 Stat. 391.) The section cited is as follows:

"That the title of the United States and of the original grantee to the lands granted by said act of Congress of March third, eighteen hundred and seventy-one, to said grantee, the New Orleans, Baton Rouge & Vicksburg Railroad Company, not herein declared forfeited, is relinquished, granted, conveyed and confirmed to the New Orleans, Pacific Railroad Company, as the assignee of the New Orleans, Baton Rouge & Vicksburg Railroad Company, said lands to be located in accordance with the map filed by said New Orleans Pacific Railway Company in the Department of the Interior, October twenty-seventh, eighteen hundred and eighty-one, and November seventeenth, eighteen hundred and eighty-two, which indicate the definite location of said road; Provided, that all said lands occupied by actual settlers at the date of the definite location of said road, and still remaining in their possession or in possession of their heirs or assigns, shall be held and deemed excepted from said grant and shall be subject to entry under the public land laws of the United States."

The defendants deny that the lands in question were erroneously patented.

A.

The patent was rightly issued under the definite location of 1871.

It is stipulated that at the date of the original grant, March 3, 1871, the lands in question were "public" lands of the United States. (R. 78.) No evidence has been introduced of any occupation of any portion of said land prior to 1877. It is stipulated that the New Orleans, Baton Rouge & Vicksburg Railroad Company, the grantee under the Act of March 3, 1871, accepted said grant. (R. 78.) The effect of this acceptance was to vest the

title to the "place" lands in the Railroad Company as a float.

St. Paul vs. Northern Pac., 139 U. S. 5,
U. S. vs. Ore. & Calif., 176 U. S. 28, 42,
Butz vs. Northern Pac., 119 U. S. 55,
Southern Pacific vs. U. S., 168 U. S. 1,
U. S. vs. Southern Pac., 146 U. S. 570,
Menotti vs. Dillon, 167 U. S. 703,
Mo. Kans. & Tex. vs. Cook, 163 U. S. 491.

It is stipulated that the New Orleans, Baton Rouge & Vicksburg Railroad Company designated the general route of its road as near as might be, and filed a map of the same in the Department of the Interior on November 11, 1871, and that said designation and map was accepted by the Secretary of the Interior. (R. 78.) On the filing and acceptance of this map, it being the only map required to be filed by the Act of March 3, 1871, the road was "definitely located" and the title to the "place" or "granted" lands vested in the specific odd numbered sections granted, including among them the lands in controversy.

Mo. Kans. & Tex. vs. Cook, 163 U. S. 491,
Van Wyk vs. Knevals, 106 U. S. 360.

Railroad Co. vs. Dunmeyer, 113 U. S. 629.

Particular attention is called to Mo. Kans. & Tex. vs. Cook, *ante*.

Prior to March 2, 1885, which was the date of the decision of the Dunmeyer case *ante*, it was the rule of the United States Land Office that the route of a land grant railroad was not "definitely fixed" until it was actually marked and staked upon the ground. In the Dunmeyer case this Court decided that this was an incorrect rule, and that the lines were "definitely fixed" when the map of "definite location" was filed and approved. Since

then this rule of "definite location" has governed. A number of cases came before this Court in which it was affirmed. All of these cases but the Cook case *ante*, involved the construction of grants which provided for two maps, one of the "general route", which was the basis of the order of withdrawal from "preemption, private entry and sale" of the "place" limits of the grant. The second map contemplated and provided for in the earlier grants was the map of "definite location", which was the map of the line upon which the road was eventually built. The rule of the earlier cases was that until "definite location" Congress might dispose of the lands within the "granted" or "place" limits, and that such subsequent disposition, if made before the "definite location" of the prior grant, would take precedence. The grant considered in the Cook case was by an Act of Congress of July 26, 1866 (14 Stat. 289). By its terms it contemplated and provided for but one map. The provision was the following:

"As soon as said company shall file with the Secretary of the Interior maps of its line designating the route thereof"

the lands should be withdrawn, etc.

The language of the Act of March 3, 1871 (Sec. 12), being the grant here in question, provides as follows:

"Said Company, within two years from the passage of this Act, shall designate the general route of its road as near as may be, and shall file a map of the same in the Department of the Interior, and when the map is so filed, the Secretary of the Interior immediately thereafter shall cause the lands within * * * twenty miles * * * to be withdrawn from preemption, private entry and sale" (16 Stat. 573, Sec. 12).

The Act of March 3, 1871, contains no other provision

as to the filing of maps designating the route of the road, or otherwise providing for its "definite location".

In the Cook case this Court held that inasmuch as the Act itself provided for but one map, the line of the road was "definitely fixed" by the filing of that map. The Court said (p. 495):

"In the instances of many of the land grants the Acts contemplated a preliminary designation of the general route by map filed in the Department of the Interior, upon which the lands were withdrawn, but the grants only took effect on a subsequent designation of the definite location of the line of the road.

* * * But this grant made no provision for any preliminary surveys and maps, and the only map provided for was that mentioned in Sec. 4, being as stated a map of its line 'designating the route thereof'. We think that by the filing of the map of the line survey the route was definitely fixed within the intent and meaning of the Act. * * * It also operated, and could not otherwise than operate, to definitely locate the line and limits or the right of way."

It follows from these decisions that on November 11, 1871, the Railroad Company had a vested title to the lands in question, subject to be defeated only by its failure to perform the conditions subsequent of the grant, followed by a regular forfeiture for such non-performance.

It is stipulated that on November 29, 1871, the Secretary of the Interior withdrew from "preemption, private entry and sale" the lands in question. (R. 78.) This order was never revoked. It follows that when, in 1877, Thomas J. Killen squatted on the Southeast quarter of the Northwest quarter of Section 3, and in 1880 when he sold his alleged "claim and improvements" to Conerly, and, in 1881, when he resumed possession, and in 1886, when he sold to Grant and Grant's occupancy of the above mentioned forty acres began, the Railroad Com-

pany had a vested title in these specific lands which antedated the alleged settlement, and these alleged settlers had notice of the railroad title because the order of withdrawal was filed in the local land office December 20, 1871. (R. 78.)

Withdrawal prevents the acquisition under the general land laws of any right or interest, in the lands so withdrawn, by one having no interest in the withdrawal.

Hamblin vs. Land Co., 147 U. S. 531,
 U. S. vs. Des Moines, 142 U. S. 510,
 Bullard vs. Des Moines, 122 U. S. 167,
 Wolsey vs. Chapman, 101 U. S. 755,
 Wolcott vs. Des Moines, 5 Wall. 681,
 Gertgens vs. O'Connor, 191 U. S. 237,
 Spencer vs. McDougal, 159 U. S. 62,
 Wood vs. Beach, 156 U. S. 548.

It is stipulated that the railroad built its road coterminous with the lands in question prior to November 17, 1882. (R. 77.) This construction having occurred before any forfeiture (for overrunning the time fixed by the grant) had been asserted by the United States, earned the grant of the lands in question beyond possibility of forfeiture.

Schulenberg vs. Harriman, 21 Wall. 24,
 Bybee vs. O. & C., 139 U. S. 679,
 Mower vs. Kemp, 42 La. An., 1007,
 V. S. & P. V. vs. Edmore, 46 La. An. 1237.

It is stipulated that the New Orleans Pacific Railway Company selected these lands as "place" lands November 8, 1883; that said list was approved by the Secretary of the Interior March 3, 1885, and patent for the lands issued the same day. (R. 81, 206.)

He who is prior in time is prior in right.

Shepley vs. Cowan, 91 U. S. 333,
 McCreery vs. Haskell, 119 U. S. 327.

It clearly appears from this statement that this patent was rightly issued, the rights of the Railroad Company being conclusively shown to have vested prior to any possession by any person whomsoever, and this at a date prior to the existence of the Act of February 8, 1887, which is the alleged basis of the Intervenor's right.

B.

The patent was rightly issued even if "definite location" was not made until November 17, 1882.

By the Act of March 3, 1887 (24 Stat. 556, Sec. 1), passed by Congress after the Act of February 8, 1887, it is provided:

"That the Secretary of the Interior be, and is hereby authorized and directed to immediately adjust, *in accordance with decisions of the Supreme Court*, each of the railroad land grants made by Congress to aid in the construction of railroads, and heretofore unadjusted."

The patent in this case, although it was issued before the Act of March 3, 1887, was issued in strict accordance with the statute just quoted, and the decisions of this Court which were to be the rule of such adjustment.

Tarpey vs. Madsen, 178 U. S. 215,
So. Pac. vs. U. S., 109 Fed. 923; 9 C. C. A. 1901,
Eastern Ore. Land Co. vs. Brosman, 147 Fed. 811.

The rule established by these cases is, that the relative rights of the Company and an individual entryman must be determined by *record evidence*, on the one part the filing of the map in the office of the Secretary of the Interior, and on the other the entry in the local land office.

Tarpey vs. Madsen was very similar to the case at bar. It involved a tract of land within the "place" limits of the Central Pacific Railroad grant. The road was "definitely located" by an approved map October 30,

1868, and was constructed and accepted prior to 1870. At the time of filing the map of definite location, there was no record evidence of any private claim; also there was no local land office at which such record of private claim could have been made (in which particular it differs from the case at bar, there being in this case at all times from 1871 down, a local land office at which private entry could have been made). A local land office was opened in April or May, 1869, and on May 29, 1869, one Olney made a preemption entry, wherein he alleged his possession to have begun April 23, 1869. Subsequently Olney abandoned. On June 20, 1896, Madsen, the defendant in error, filed a homestead entry on the same land and alleged that he had been a settler and in occupation since 1888. There was a contest in the land office. Madsen claimed, and the Register and Receiver found, that prior to October 20, 1868 (the date of the definite location), Olney, the original preemptioner, had been in occupation, and therefore that the land was excepted from the railroad grant, and that the railroad selection should be canceled and Madsen permitted to perfect his entry. This decision was affirmed by the Commissioner of the Land Office, Madsen's entry was perfected and a patent issued to him. Thereupon Tarpey, the plaintiff in error, the grantee of the Railroad Company, sued in the territorial court of Utah to establish his title and recover possession. A decree was entered in favor of the defendant, appealed to the Supreme Court of Utah and there affirmed. From that decision appeal was taken to this Court. The Court said (p. 219):

"A narrow but important question is presented by this record. The land * * * is * * * within the place limits of the grant to the Central Pacific Railroad Company. The identification of the lands * * * was made at the time the map of definite location was filed * * * and * * * approved * * * and the question is whether

there was anything in the *occupation or entry* by Olney to defeat the title apparently then passing to the railroad company. That there was nothing of record affecting the validity of that title is conceded. No one, by an investigation of any public record, could have ascertained at that time that there was any doubt in respect thereto."

The Court then calls attention to the fact that there was no local land office at which preemption entries could be made, and holds that, owing to that fact, failure to make record entry was not chargeable against Olney, and could not defeat his claim if he were urging it. The Court then calls attention to the fact that Olney, in his declaratory statement in the local land office, dated his occupation from April 23, 1869, which was subsequent to the date of the "definite location" of the road, and also that he had abandoned, and says (p. 220):

"But when the original entryman, either because he does not care to perfect his claim to the land, or because he is conscious that it is invalid, abandons, and a score of years thereafter some third party comes in and attempts to dispossess the railroad company * * * of its title—apparently perfected and unquestioned during these many years—he does not come in the attitude of an equitable appellant to the consideration of the Court. It must be remembered that mere occupation of public lands gives no right as against the government * * * (page 222). It is undoubtedly true that one occupying land with the purpose of preemption is given thirty days within which to file with the Register of the Land Office his declaratory statement, * * * and since 1880 the same right has been possessed by any one desiring to make a homestead entry. Act of May 14, 1880, 21 Stat. Chap. 89, Sec. 3. So that any controversy between two occupants of a tract open to preemption and homestead entry is not determined by the mere time of the filing of the respective claims in the Land Office, but by the fact of prior occupancy, and these controversies are of frequent cognizance. Oral evidence, therefore, of the date of

occupation may be decisive of the controversy between such individual applicants for a tract of public land, but by decisions of this Court running back to 1882, as between a railroad company holding a land grant, and an individual entryman, the question of right has been declared to rest not on the mere matter of occupancy, but upon the state of the record. All the cases in this Court in which this question has been discussed and the conclusion announced, have been since the Act of 1880, giving to persons seeking a homestead the same rights in respect to occupancy as to persons intending a pre-emption."

The Court then proceeds to call attention to:

U. S. vs. Winona, 165 U. S. 463, 473,
 Van Wyck vs. Knevals, 106 U. S. 360,
 Kansas Pacific Ry. Co. vs. Dunmeyer, 113 U. S.
 629,
 Hastings & Dakota R. R. Co. vs. Whitney, 132 U. S.
 357,
 Whitney vs. Taylor, 158 U. S. 85,
 Lounsdale vs. Daniels, 100 U. S. 113, 116,
 Northern Pacific R. R. Co. vs. Colburn, 164 U. S.
 383,
 Northern Pacific vs. Sanders, 166 U. S. 620, 630,

and other cases, and then proceeds (page 227):

"And surely Congress, in making a grant to a railroad company, intended that it should be of present force, and of force with reasonable certainty. . . . It cannot be supposed that Congress contemplated that, as in this case, a score of years after the line of definite location had been fixed and made a matter of record, some one should take possession of a tract apparently granted and defeat the Company's record title by oral testimony that, at the time of the filing of the map of definite location, there was an actual though departed occupant of the tract, and therefore that the title to it never passed. The conditions are very different from those which

exist between two individual occupants and claimants of a particular tract, for each is there in possession to watch and know the action of the other, and the question of right is subject to immediate and certain determination. In the present case, on the other hand, years after the title of the railroad company had apparently vested, this defendant comes in and says this tract was excluded from the grant because somebody was in occupation, and if this can be said at the end of twenty years, equally well can it be said at the end of half a century. So it is that, interpreting the Act making the grant as a law as well as a grant * * * this Court properly held that the records made in the office of the Secretary of the Interior and in the local land offices should be conclusive as between the Company and the individual entryman. And if the ruling at times may operate against an individual entryman, it does so more frequently against the railroad company * * * (228). We are of opinion that a proper interpretation of the Acts of Congress making railroad grants like the one in question requires that the relative rights of the Company and an individual entryman must be determined not by the Act of the Company in itself fixing definitely the line of its road, or by the mere occupancy of the individual, but by record evidence on the one part, the filing of the map in the office of the Secretary of Interior, and on the other the declaration or entry in the local land office. In this way matters resting on oral testimony are eliminated, a certainty and definiteness is given to the rights of each, the grant becomes fixed and definite, and while, as repeatedly held, the railroad company may not question the validity or propriety of the entryman's claim of record, its rights ought not to be defeated, long years after its title had apparently fixed, by fugitive and uncertain testimony of occupation; for if that be the rule, as admitted by counsel for the defendant in error on the argument, the time will never come at which it can be certain that the railroad company has acquired an indefeasible title to any tract."

The decision below was reversed.

In the case at bar, the first "definite location" of the

New Orleans Pacific Railroad was in 1871, five years before any occupancy of this land, and more than thirteen years before the claimant Grant entered into possession. The second "definite location" of the road was November 17, 1882, after the road had been constructed, for, as appears from the records of the investigation of this matter, before the Forty-eighth Congress, the map of November 17, 1882, was the map filed with the Commissioners who were appointed by the President to inspect the road after it was built. After that the Land Office demanded of the Railroad Company a map of "definite location", which, under the decision of Mo. Kansas & Texas vs. Cook, it had no right to ask. The Railroad Company thereupon, by letter, agreed that the Land Office might regard the map filed with the Commissioners as proof of the construction of the road, as the map of "definite location". (Senate Ex. Doc. No. 31, 1st Sess. 48th Cong., pp. 77-82.) Taking this map as the basis of the company's right to the "place" land, the claimant Grant never had any possession of any portion of the lands in controversy until more than three years after the filing of this second map, and had never attempted to make any homestead entry until more than eight years after the filing of this map.

It is to be remembered that the claimant's rights, if any he has, cannot date earlier than from February 9, 1886, when he entered into possession, since he acquired nothing by assignment from Killen. A homestead right is not assignable; a sale thereof is an abandonment.

R. S. Sec. 2297,

Keene vs. Brygger, 160 U. S. 276,

Love vs. Flahive, 205 U. S. 195, 202.

During all of the years from 1871, this land was surveyed, there was a land office in existence at which entry could have been made, and yet none was attempted until

more than five years after the date of the patent, and until after the Railroad Company had sold all of the land in question to third parties. (R. 78.)

Under the rule in Tarpey vs. Madsen, which by the law of March 3, 1887, must be here applied, the rights of the appellee lumber companies are prior in time and superior to those of any other party to the cause.

C.

The patent was rightly issued because the proviso of Sec. 2 of the Act of February 8, 1887, applies only to "granted" or "place" lands to which the United States by Sec. 2 released and conveyed title. The lands here in dispute do not come within that category.

(a)

Sec. 1 of the Act of February 8, 1887, provides:

"That the lands granted to the New Orleans, Baton Rouge & Vicksburg Railroad Company by the Act * * * approved March 3, 1871, are hereby declared to be forfeited to the United States of America in all that part of said grant which is situate on the east side of the Mississippi River, and also in all that part of said grant on the west of the Mississippi River which is opposite to and coterminous with the part of the New Orleans Pacific Railway Company which was completed on the 5th day of January, 1881; and said lands are restored to the public domain of the United States."

Section 2 provides:

"That the title of the United States and of the original grantee to the lands granted by said Act of Congress of March 3, 1871, to * * * the New Orleans, Baton Rouge & Vicksburg Railroad Company not herein declared forfeited, is relinquished, granted, conveyed and confirmed to the New Orleans Pacific Railroad Company, as the assignee of the New Orleans, Baton Rouge & Vicksburg Railroad

Company. * * * Provided, that all said lands occupied by actual settlers at the date of the definite location of said road, and still remaining in their possession, or in the possession of their heirs or assigns, shall be held and deemed excepted from said grant, and shall be subject to entry under the public land laws of the United States."

Under this section the date of "definite location" in relation to the lands in controversy, was November 17, 1882.

By the language of this Act it has no application except to the "lands granted" by the Act of March 3, 1871—that is, to "place" lands—to which the United States released title by Sec. 2 of the Act of February 8, 1887.

1. That "lands granted" are "place" lands is apparent not only from the language of the Act, but from decisions of this Court. To what do the words "all said lands" used in Section 2 proviso refer? By the Act "the lands granted" to the N. O., B. R. & V. Railroad Co. were forfeited east of the Mississippi and west of the Mississippi south of Whitecastle. The title of the United States to the remaining "lands granted" was "relinquished, conveyed and confirmed" to the N. O. P. R. R. Co., excepting (proviso Sec. 2) "all said lands occupied", etc.

Manifestly the words of the proviso "all said lands" refer to the "lands granted" used in the same section of the act. They can refer to nothing else, for nothing else is spoken of in the act as being granted. The exception, therefore, is as to the "lands granted" or "place" lands to which the title of the United States and of the original grantee is relinquished by the Act in question.

2. The original Act of March 3, 1871, by Section 22 of which this grant was made, puts the grant in this form (see Sec. 9):

"There is hereby granted * * * every alter-

nate section of public land, not mineral, designated by off numbers to the amount of twenty alternate sections per mile on each side of said railroad line • * * through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad in California where the same shall not have been sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed. In case any of said lands shall have been sold, re- served, occupied or preempted or otherwise disposed of, other lands shall be selected in lieu thereof by said company under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections first above named, and not including the reserved numbers."

By Section 22, the grant to the New Orleans, Baton Rouge & Vicksburg Railroad Company was in the following language:

"There is hereby granted to said company • * * the same number of alternate sections of public land per mile in the State of Louisiana as are by this Act granted in the State of California • * * and said lands shall be withdrawn from the market, selected and patents issued therefor • * * upon the same terms and in the same manner and time as is provided for and required from the said Texas Pacific Railroad Company within the State of California, etc."

It will be observed that the granting act designates as "granted lands" the lands within the "place limits", and as "lands to be selected in lieu thereof" the lands within the "indemnity limits". It is the law that as to the lands within the "place limits", the title of the Railroad Company vests in the specific lands at the time of the filing and approval of such map of definite location as is required by the granting act. Such vesting of title to the "place" lands confers, however, no title whatever

to "indemnity lands". The title to the indemnity lands vests in the Railroad Company only on approval of its list of selections by the Secretary of the Interior. Until those selection lists are approved, any person entitled by law to acquire the lands of the United States may acquire any of the lands within the "indemnity limits" and cut off absolutely any possible right of the Railroad Company. At the period under discussion, the only way that anyone could acquire lands in Louisiana was under the homestead act. From the time of this grant in 1871 down to the date of the approval of the selection lists, whenever that might happen to be, any occupant of these lands could have made a valid homestead entry of any of the "indemnity" lands at any time by simply going through the statutory formalities, and his homestead entry on such "indemnity" lands would be superior to any title the Railroad Company might acquire. For these reasons it was unnecessary for Congress to undertake to protect actual occupants on the lands (as it undertook to do by the proviso of Sec. 2 of the Act of 1887), where the occupant was on lands within the "indemnity limits" and not within the "place limits". The title of the Railroad Company had vested in the "place" lands by the filing of its general location map in 1871, as provided by the original granting act. If there had been no occasion for the Railroad Company to appeal to Congress for a confirmation of the grant, the Railroad Company's title to the "place" lands would have been absolute from that date, and no settler who had not acquired rights on the record prior to that date would have had any rights against the Railroad Company. For the purpose of protecting such settlers on such lands against the confirmatory act of 1887, Congress inserted this provision of Section 2, which was clearly to protect the settlers insofar as the lands in the "place limits" were concerned, but which

was absolutely unnecessary to protect settlers on lands within the "indemnity limits", because at that time and for years afterwards, or until the selection lists were approved by the Secretary of the Interior, the Railroad Company had absolutely no right or claim against the United States or anyone else to "indemnity" lands. Before the Railroad Company could acquire any rights in indemnity lands, it was necessary that it be determined,—

(1st) That there was a shortage of the grant within the "place limits";

(2nd) The Railroad Company must have selected its "indemnity" lands and filed its list with the Secretary of the Interior;

(3rd) The Secretary of the Interior must have passed on those lists, determined that the Railroad Company was entitled to select those lands which involved a determination by the Secretary of the Interior that no one else had any right as against the United States, and the Secretary of the Interior must have approved those lists.

Not until then did the railroad acquire any rights against the United States or anyone else in the "indemnity" lands. For these reasons on principle and reason, as on the language of the act, we conclude that the proviso applies only to "place" lands to which the United States by the Act of February 8, 1887 released title.

3. On authority the words "granted lands" include only "place" lands.

Barney vs. Winona, 117 U. S. 228,

Winona vs. Barney, 113 U. S. 618,

Hewitt vs. Schultz, 180 U. S. 139,

Southern Pacific vs. Bell, 183 U. S. 675,

U. S. vs. Southern Pacific, 223 U. S. 565.

And see,—

Clark vs. Herington, 186 U. S. 206,
O. & C. R. R. vs. U. S., 189 U. S. 103,
Humbird vs. Avery, 195 U. S. 508,
Hoyt vs. Weyerhauser, 161 Fed. 328,
S. C. 219 U. S. 381,
U. S. vs. Southern Pacific, 93 C. C. A. 147, S. C.
161 Fed. 510.

In *Barney vs. Winona*, 117 U. S. 228, the Court said:

"In the construction of land grant acts, in aid of railroads, there is a well-established distinction observed between 'granted lands' and 'indemnity lands'. The former are those falling within the limits specially designated, and the title to which attaches when the lands are located by an approved and accepted survey of the line of the road filed in the Land Department, as of the date of the act of Congress. The latter are those lands selected in lieu of parcels lost by previous disposition or reservation for other purposes, and the title to which accrues only from the time of their selection. It is these 'granted lands' of the prior grant falling within the six-mile limit that, in our opinion, are reserved, and not the possible indemnity lands which might be subsequently acquired. These granted lands of the prior grant being in place could be readily deducted from the four sections, also in place, whenever the roads of the two companies intersected, and the lands fell within the four sections. The quantity thus granted is found by the special masters appointed by the court to be fifteen thousand acres and 45/100 of an acre. This quantity only, in addition to the lands used for the track of the road of the Winona and St. Peter Railroad Company, and for depots and other purposes necessary and incident to its operation, should, therefore, be deducted from the number of acres, to a conveyance of which from the company the plaintiffs, by the decree of the court below at its December Term, 1880, were adjudged to be entitled."

In *Winona vs. Barney*, 113 U. S. 618, this Court, speaking of the railroad grant to the State of Minnesota of March 3, 1857, says (p. 626):

"The indemnity clause covers losses from the grant by reason of sales and the attachment of pre-emption rights previous to the date of the act, as well as by reason of sales and the attachment of pre-emption rights between that date and the final determination of the route of the road."

Again, on page 627:

"The grant by the Act of 1857 is one of description, that is, of land in place and not of quantity. It is of every alternate section, designated by odd numbers, for six sections on each side of the road, that is, of particular parcels of land lying within certain defined lateral limits to the road and described by numbers on the public surveys. And the indemnity clause provides for loss from those parcels by sales or the attachment of preemption rights before the route becomes 'definitely fixed'."

And speaking of the Act of March 3, 1865, which enlarged the grant made by the Act of March 3, 1857, the Court says (p. 628):

"The only lands granted by the Act of 1865 are the four sections for each mile additional to the original six, accompanied with a right to select indemnity lands within twenty miles of the road."

In *Barney vs. Winona*, 117 U. S. 228, there is an express ruling that an exception from "granted" lands does not apply to "indemnity" lands.

In *Hewitt vs. Schultz*, 180 U. S. 139, a similar distinction is made.

Southern Pacific vs. Bell follows the case last cited and expressly holds that where the statute authorizes the withdrawal of "lands hereby granted", it did not authorize the withdrawal of "indemnity" lands. It follows *a fortiori* that where an exception is made from "lands

granted", such exception applies only to "place" lands.

The lands in question in this case were "place" lands and come within the definition of "lands granted", but they do not come within the definition of lands to which the United States or the original grantee released title by the Act of February 8, 1887.

No title of the original grantee was released or conveyed by the Act of February 8, 1887. That title had passed from the New Orleans, Baton Rouge & Vicksburg Railroad Company to the New Orleans Pacific Railway Company by deed of January 5, 1881. The original grantee had filed its map of "definite location" in 1871. In 1881 it conveyed the title so acquired. In 1887 it had no title to transfer. The title of the United States to the lands in controversy had vested in the New Orleans, Baton Rouge & Vicksburg Railroad Company on the filing of the general route map of 1871, had passed to the New Orleans Pacific Railroad Company by deed January 5, 1881, and the patent had issued March 3, 1885. The title of the United States finally passed when patent issued.

Tmblen vs. Lincoln, 161 U. S. 52, 56.

So that on February 8, 1887, when the United States by this act undertook to *release and convey*, the United States had no title of any kind, not even a right to forfeit, for at that time the railroad had been constructed and the grant earned past any possibility of forfeiture.

Schulenberg vs. Harriman, 21 Wall. 44,

Bybee vs. O. & C., 139 U. S. 679,

Mower vs. Kemp, 42 La. Ann. 1007,

V. S. & P. vs. Edmore, 46 La. Ann. 1237.

While the lands in controversy are "granted" or "place" lands, *they are not lands to which the United State by Sec. 2 released and conveyed title. Hence the*

Act of February 8, 1887, does not apply, and there is no error in the patent.

(b)

Section 2 of the Act of February 8, 1887, can by no possibility have any application to the South half of the Northwest quarter of Section 3, Township 3 North, Range 7 West, that being the north half of the lands in controversy. The impossibility of applying the Act of 1887 to these eighty acres is readily apparent. At the time of the passage of the Act of 1887 and its acceptance by the Railroad Company the Railroad Company had parted with the title to this eighty, having sold it August 21, 1886, to one John T. Granger. (R. 36, 37, 79.)

As we have seen, in the absence of the statute of February 8, 1887, there could be no possible doubt or controversy as to the railroad title to this land. The railroad having conveyed it prior to the enactment of the Act of February 8, 1887, that act can have no application to this eighty, for the simple reason that to deprive Mr. Granger of this title by legislative act would be to take his property without due process of law, and without giving him a chance to be heard in his own defense, all of which is forbidden by the Constitution of the United States. Therefore, considered as a statute, the act in question would have no effect upon the title to this eighty, and considered as a contract between the Government and the Railroad Company, it could have no effect owing to the railroad's incompetency to contract away the title to property which it did not own.

(c)

Section 2 can have no possible application to the Northwest quarter of the Southwest quarter of Section 3, Town 3 North, Range 7 West, because neither the Inter-

venor Grant nor his alleged assignors ever had any possession thereof. At the time of the trial of this case, this forty was agreed to be virgin forest without any signs of occupation. (Map, R. 198.)

The Act of February 8, 1887, excepts from the grant only lands occupied by actual settlers at the date of the "definite location" of said road and still remaining in their possession or in the possession of their heirs and assigns. That is to say, lands continuously occupied from November 17, 1882, to February 8, 1887. The testimony is undisputed that during that period this forty acres was virgin forest. This forty, therefore, does not come within the terms of the exception, even if that exception operates.

The Northwest quarter of the Southwest quarter of Section 3 does not lie on the same technical quarter section as the South half of the Northwest quarter of Section 3. A residence on the latter is not therefore possession of the former, presumptively or otherwise. There never were any improvements or cultivation on this forty. There were no signs claiming ownership on this forty. There is no testimony of any actual notice of Grant's claim given to any purchaser, as far as this forty is concerned. Grant can therefore claim nothing from possession of this forty.

L. R. Hall, 5 L. D. 141,
Brown vs. C. P. R., 6 Id. 151,
U. P. R. vs. Simmons, 6 Id. 172,
Sweet vs. Doyle, 17 Id. 197,
Cooper vs. Sanford, 11 Id. 404,
S. P., M. & M. vs. Donohue, 210 U. S. 21.

(d)

The Act of February 8, 1887, does not apply to the Northeast quarter of the Southwest quarter.

To bring about the exception claimed, there must have been an actual settler on this property from November 17, 1882, to February 8, 1887. During this period the testimony shows that there was no residence on this land. Grant's residence was on the forty to the north, on land privately owned which, we have seen, could not possibly have been affected by the Act of 1887, it not having been railroad property at the time of the passage of that act. Grant's residence was, therefore, a pure trespass.

We respectfully submit that the cultivation of a small portion of a forty acre lot, without residence thereon, does not constitute occupation by an actual settler within the meaning of the United States Land Laws. There must be a dwelling on the premises in question, not on another's property.

R. S. Sec. 2291,

Ferguson vs. McLaughlin, 96 U. S. 174,
S. P., M. & M. vs. Donohue, 210 U. S. 33,
Burleson vs. Durham, 46 Tex. 152, 160,
Garitt vs. Mohr, 68 Cal. 506,
Baker vs. Millman, 77 Tex. 46,
Bratton vs. Cross, 22 Kan. 673, 678.

D.

(a) The patent was rightly issued because there is no competent evidence of any error therein. No fraud is alleged. If we concede the applicability of the Act of February 8, 1887, the alleged error depends for its existence upon the question of whether an actual settler was occupying the lands in dispute on November 17, 1882, the date of the "definite location", and from thence to February 8, 1887.

The question of whether or not a person is in posses-

sion of a tract of land at a given time is a question of fact.

Johnson vs. Drew, 171 U. S. 93.

In this case the Court said (p. 99) :

"Whether a party was or was not in possession of a particular tract at a given time is a question of fact, depending upon parol testimony, and if there is any one thing respecting the administration of the public lands which must be considered as settled by repeated adjudications of this Court, it is that the decision of the land department upon mere questions of fact is, in the absence of fraud or deceit, conclusive, and such questions cannot thereafter be litigated in court."

Gertgens vs. O'Connor, 191 U. S. 237,

Logan vs. Davis, 233 U. S. 623, 630.

The issuance of a patent by the Land Department is a determination by the proper tribunal of the existence of any facts necessary to authorize such issuance. And such determination is conclusive and subject to direct attack only for fraud.

Burke vs. Southern Pacific, 234 U. S. 669,

Barden vs. Northern Pacific, 154 U. S. 288,

Davis vs. Weibbold, 139 U. S. 507,

Smelting Co. vs. Kemp, 104 U. S. 636, 640,

Shaw vs. Kellogg, 170 U. S. 312, 339,

Knight vs. U. S. Land Assn., 142 U. S. 161, 176.

And as here no fraud is alleged, the decision is conclusive on the United States.

See cases ante,

U. S. vs. Minor, 144 U. S. 233.

And it is also conclusive against the Intervenor.

Burke vs. Southern Pacific, 234 U. S. 669.

In the latter case, Burke, by bill, sought to obtain title

to certain lands which had been patented to the Railroad Company. The Court says (p. 676):

"The suit is one wherein rights asserted under a patent are called in question by parties whose only claim to the lands was initiated more than fourteen years after the date of the patent."

It is to be remarked that in the case at bar the patent is called in question by a party whose only claim, if dated from his occupation, was initiated more than eleven months after the date of the patent; and if dated from his attempted record entry, was begun more than five years after the date of the patent.

The Court in the Burke case held that the patent could not be successfully attacked by strangers who had no interest in the land at the time the patent was issued, and therefore were not prejudiced by it.

On page 711, the Court, answering Question No. 6 certified to it, said:

"Q. Does the fact that the appellant was not in privity with the Government in any respect at the time when the patent was issued to the Railroad Company, prevent him from attacking the patent on the ground of fraud, error or irregularity in the issuance thereof, as so alleged in the bill?

A. It does."

We assume that counsel for the complainant will claim the same conclusive effect for the decision of the Land Office made in 1896 in Grant's favor. No such effect can be given to the latter decision because,—

(1) When the patent was authorized, the Land Office had jurisdiction to hear and decide. When the patent had issued its jurisdiction was gone.

U. S. vs. Schurz, 102 U. S. 378,
 Stimson vs. Rawson, 62 Fed. 426,
 Bickness vs. Comstock, 113 U. S. 149,

Moore vs. Robbins, 96 U. S. 530,
Gibson vs. Chouteau, 13 Wall. 92.

(2) The ruling in the Grant case is based upon a misapplication of the law, for the Act of February 8, 1887, does not apply to these lands, as we have shown above. A ruling of the Land Department on a question of law is never conclusive.

(3) At the time of the filing of Grant's homestead entry in 1890, the Railroad Company had parted with its title to all the lands in question. The holders of the railroad title were neither parties to nor notified of the contest. The decision in the contest therefore is of no force as against them.

The evidence introduced by the complainants as to possession from 1882 to 1887 was promptly objected to for reasons given. (R. p. 124.)

(b) Neither of the complainants has any interest giving them a right to prosecute this suit. The Government has no interest.

1. It patented this land March 3, 1885, nearly thirty years prior to beginning this suit.

2. Whether the patent was erroneous or not, as to the United States the suit is barred by statute.

Act of March 3, 1891, 24 Stat. 1093,
Act of March 2, 1896, 29 Stat. 42,
U. S. vs. Chandler, 209 U. S. 447.
(See argument *post V. A.*)

3. The patent title is confirmed by Act of March 2, 1896,
29 Stat. 42,
U. S. vs. Winona, 165 U. S. 463,

the good faith of the appellee lumber companies being found by the court.

(See argument *post V. B.*)

4. The United States by its bill claims no interest. The Intervenor shows no interest (See *post V. B.*). As neither complainant nor intervenor show interest, they have no right to attack this patent for any cause.

Intervenor is guilty of laches. Where the Government has no real interest and is acting for others, laches is pleadable. It has been pleaded.

U. S. vs. Beebe, 127 U. S. 338, 347,
U. S. vs. Des Moines, 142 U. S. 510, 538,
Moran vs. Horsky, 178 U. S. 205, 214,
U. S. vs. Am. Bell Tel., 167 U. S. 224, 265,
France vs. Saratoga, 191 U. S. 437.

The gross laches of Intervenor is apparent. Grant established his residence February 9, 1886. He says he was informed within a year thereafter that the land was railroad land. Whatever rights his settlement may have given him, he never stirred a finger to assert those rights until December 20, 1890, when he filed his homestead entry. He had not only entered, as he says, on patented land with intent to perfect a homestead entry thereon, but he had waited before taking any steps to perfect such entry until the land passed from Railroad Company to individual purchasers. So far as the record shows, Grant never did anything to assert a claim to the land in question from that time down to the time of the filing of his petition for intervention. One-half of this land he allowed to remain absolutely without any sign of occupation thereon from 1886 to 1913 and 1914. He constantly returned to the tax officials a statement of non-ownership of these premises, clearly showing that he did not claim these lands. (See appendix.)

The general situation as to the intervenor's laches is well summed up in the decision of the Court of Appeals for the Fifth Circuit. (149 C. C. A. 156, 157.)

1. Grant settled on land legally withdrawn from "pre-emption, private entry and sale" fifteen years, nine months and twenty days prior to his settlement; and patented eleven months and six days prior to his settlement. He admits that before February 8, 1887, he knew the land was railroad land and therefore not open to homestead entry.

Grant can claim no rights prior to his settlement on February 9, 1886, since Killen, his assignee, had nothing to sell and could transfer no rights.

Love vs. Flahive, 205 U. S. 195, 202,
Keene vs. Brygger, 160 U. S. 276,
R. S. 2297.

If he had any rights (which we deny) he—

(a) Waited without attempt to assert them until the land on which he resided was sold August 21, 1886, to another. Of this conveyance he had constructive notice from the record January 31, 1887. Still he does not act.

(b) February 8, 1887, was the Act which he claims gave him "rights". (This too is denied.) Still he waits doing nothing to assert his rights until the remainder of the land has been sold to others, one forty of it twice.

(c) December 20, 1890, he files entry in an office which has no jurisdiction, and does not make parties to his contest the owners of this property.

(d) And then waits twenty-five years, seven months and seven days before further acting, in which interval the Northwest quarter of the Southwest quarter was transferred of record twice, the South half of the Northwest quarter was transferred of record once and the Northeast quarter of the Southwest quarter was transferred of record once, to parties paying value and who could not by search ascertain that Grant had any legal claim whatsoever. (R. 80-81, 144-156.)

(See *post* Good Faith of Purchasers.)

(e) For twenty-nine years he returns to the taxing authorities of Louisiana that he does not claim to own this land and he allows others to pay the taxes on the land for twenty-nine years. (R. 80.)

V.

The United States is barred from the cancellation prayed by its own statute of limitations, and intervenor is equally barred.

So far as this plea of limitations is concerned, it is immaterial if the patent was erroneous or void, valid or invalid, when issued. The statutes of limitations have validated it.

March 2, 1896 (29 Stat. 42), Congress provided:

"That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under railroad or wagon road grant, shall be brought within five years from the passage of this Act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of Sec. 8 of Chap. 561 of the Acts of the Second Session of the Fifty-first Congress and amendments thereto is extended accordingly as to the patents herein referred to. But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right of such purchaser is hereby confirmed."

The limitation of Sec. 8, Chap. 561 (26 Stat. 1093, 1099), is as follows:

"That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this Act, and suits to vacate and annul patents hereafter issued shall only be brought within six years from the date of the issuance of such patent."

If the patent was valid when issued or was void on its

face, the Act of 1891 would cover it. As it is a railroad grant patent, if it was, as appellants claim, erroneously issued, the Act of 1896 would cover it.

If for the sake of argument we concede that the patent was erroneously issued, the real title remained in the United States. No individual or other claims had "*attached*" thereto, and the patent title was confirmed by subsequent legislation.

It cannot be contended that the United States lacked power to convey title to that which it owned, and which at the time of conveyance by the United States was public land and free from individual and other claims.

It is the claim of the defendants that the patent of March 3, 1885, in controversy here has been confirmed by the Acts referred to.

(a) By the limitation.

(b) By the confirmation to good faith purchasers.

A.

This is a suit by the United States to vacate and annul a patent claimed to have been erroneously issued under a railroad grant. Patent issued March 3, 1885, suit to vacate was begun in 1915, approximately thirty years later. By the terms of the Act of March 2, 1896, the limitation expired March 2, 1901, more than fourteen years prior to suit. The case is squarely within the statute, if the statute be applicable.

The statute is applicable. By its own terms it applies to "any * * * patent * * * heretofore erroneously issued * * * under railroad * * * grant", which is the precise case alleged by the Government.

The authorities have invariably held these statutes applicable to such patents. No case to the contrary has been found. In *Winona vs. U. S.*, 165 U. S. 463, the Act

was applied to the grant to Minnesota, for the benefit of the Winona & St. Peter Railroad, made by the Act of March 3, 1857, and amended by the Act of March 3, 1865. In this case, decided in 1896, the Court considered the Acts of March 3, 1887, March 3, 1891, and March 2, 1896, the acts herein pleaded in defense, and held that where lands had been erroneously patented or certified under the grant the limitation acts above quoted would bar a suit commenced after the expiration of the limitation. On page 476 the Court said, speaking of the Act of 1891:

"Under the benign influence of this statute, it would not matter what the mistake or error of the land department was, what the frauds and misrepresentations of the patentee were, the patent would become conclusive as a transfer of the title, provided only the land was public land of the United States, and open to conveyance and sale through the Land Department."

These acts of limitation were held applicable to the grant to the Southern Pacific.

U. S. vs. Southern Pacific, 184 U. S. 49,
Southern Pacific vs. U. S., 228 U. S. 618,
Burke vs. Southern Pacific, 234 U. S. 693,
U. S. vs. Southern Pacific, 157 Fed. 96, 100.

To the grant to the State of Minnesota for the Milwaukee & St. Paul road:

U. S. vs. Chicago, Milwaukee & St. Paul, 195 U. S. 524.

To the grant for the St. Paul, Minneapolis & Manitoba Road:

U. S. vs. St. P., M. & M. Ry., 225 Fed. 27,

To the Oregon and California Railroad Grant:

U. S. vs. Oregon & California R. R., 186 Fed. 861.

In the case of *United States vs. Oregon & California*,

186 Fed. 861, 889, the Court said, alluding to the Acts of March 3, 1891, and March 2, 1896:

"The two statutes read together put all patents, whether issued in pursuance of railroad grants or otherwise, in the same category, and suits by government to cancel cannot be maintained, except as thereby provided."

In *United States vs. Southern Pacific*, 157 Fed. 96, 100, the Court said:

"The acts relate to the erroneous conveyance of lands under the supposed authority of the original granting acts, and in this respect may be deemed amendatory to such acts. But they have a broader foundation than that. They were independent acts, and do not purport to alter, amend or repeal the Act of July 27, 1866, granting lands to the Atlantic and Pacific Railroad Co., or the Act of March 3, 1871, granting lands to the Southern Pacific Railroad Company. They were passed by Congress pursuant to its constitutional authority to make all needful rules and regulations respecting the territory or other property belonging to the United States. Under this authority Congress is vested with full power to protect its interest in the public lands, and to adopt such measures as will secure by legal procedure either a reconveyance of or compensation for land improperly conveyed. The Acts of March 3, 1887, and March 2, 1896, are in exercise of this power."

This is a decision of one of the courts of the United States holding these statutes expressly applicable to the grant in question, for the grant to the Texas Pacific finally became the property of the Southern Pacific Railroad Co. (See Act of June 22, 1874, 18 Stat. 197.) Also Sec. 23 of the Act of March 3, 1871—the Texas Pacific Grant—made a grant to the Southern Pacific, and the acts in question have been held applicable to that grant.

S. P. vs. U. S., No. 1, 200 U. S. 341,
S. P. vs. U. S., No. 2, Id. 354.

The said statutes have also been applied to this particular grant by the Supreme Court of Louisiana.

Iatt vs. Fairecloth, 61 S. Rep. 866; 132 La. 906,
Bodeaw vs. Bonnette, 65 So. Rep. 493; 135 La.
369.

The effect of the statute of limitations is to bar the United States as to the cancellation prayed.

U. S. vs. Chandler, 209 U. S. 447,
Northern Pacific vs. U. S., 227 U. S. 355,
U. S. vs. Winona, 165 U. S. 476,
Burke vs. Southern Pac., 234 U. S. 669, 693.

In United States vs. Chandler, which was a suit to remove a cloud from a title—not to cancel a patent—the Supreme Court, speaking of the Act of March 3, 1891, which is the same language as that of the Act of March 2, 1896, except that the Act of March 2, 1896 is limited to railroad and wagon road grant patents, while the Act of March 3, 1891, applies to all patents issued by the United States, said (p. 450):

“In form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land, at least, which cannot escape from the jurisdiction, generally are held to affect the right, even if in terms only directed against the remedy. Lefingwell v. Warren, 2 Black, 599, 605; Sharon v. Tucker, 144 U. S. 533; Davis v. Mills, 194 U. S. 451, 457. This statute must be taken to mean that the patent is to be held good and is to have the same effect against the United States that it would have had if it had been valid in the first instance. See United States v. Winona & St. Peter R. R. Co., 165 U. S. 463, 476.”

When the United States is barred, any one claiming under it, by claim attaching after the patent, is likewise barred.

Budzisz vs. Illinois Steel Co., 82 Fed. 160,
Burke vs. So. Pac., 234 U. S. 669, 693.

B.

Conceding again for argument's sake that the patent was erroneously issued, the Government's title to the lands referred to has passed to W. R. Pickering Lumber Company and Southland Lumber Company under the good faith confirmation provision of the Act of March 2, 1896. Section 1 of that Act provides:

"No patent to any of the lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed." (29 Stat. 42.)

Section 2 of the same act provides that if a person claiming to be a bona fide purchaser shall, before suit brought to cancel the patent, satisfy the Secretary of the Interior that he is such purchaser, the Secretary of the Interior shall cause suit to be brought to recover from the original patentee the minimum Government price of the land and "the title of such claimant shall stand confirmed." Section 2 further provides:

"An adverse decision by the Secretary of the Interior on the bona fides of such claim shall not be conclusive of his rights, and if such claimant, or one claiming to be a bona fide purchaser, but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit, and is found by the court to be a bona fide purchaser, the court shall decree a confirmation of the title * * * ." (29 Stat. 42.)

The defendants W. R. Pickering Lumber Company and Southland Lumber Company each set up its good faith and prayed in its answer the confirmation of its title under General Equity Rule 30. (R. 21, 30, 40.) The court by its decree confirmed the title of each. This is an express finding of the good faith of each of the defendant lumber companies.

In the case of the *United States vs. Winona*, 165 U. S.

463, 480, it was held that this protection is granted, not simply to bona fide purchasers in the technical sense, but to those who have one of the elements declared to be essential to a technical bona fide purchaser, namely, GOOD FAITH, and that it did not matter what constructive notice might be chargeable to the purchaser, if in actual ignorance of defect in the railroad company's title, and in reliance on the action of the Government in the apparent transfer of title by patent, the holder of the patent title had made an honest purchase of the land. The Court says, page 477:

"Given a bona fide purchaser, his right and title is confirmed, and no suit can be maintained at the instance of the government to disturb it."

The Court then considers the definition of a bona fide purchaser under this act, and holds that the act operates (page 481):

"To confirm the title to every purchaser from a railroad company of lands certified or patented to or for its benefit, notwithstanding any mere errors or irregularities in the proceedings of the Land Department, and notwithstanding the fact that the lands so certified or patented were by the true construction of the land grants, although within the limits of the grant, excepted from their operation, providing he purchased in good faith, paid value for the lands, and providing also that the lands were public lands in the statutory sense of the term, and free from individual or other claims."

The Court further says (page 480):

"It will be observed then that protection is not granted to simply bona fide purchasers (using that term in the technical sense) but to those who have one of the elements declared to be essential to a bona fide purchaser, to-wit, good faith. It matters not what constructive notice may be chargeable to such purchaser, if in actual ignorance of any defect of the railroad company's title, and in reliance upon the

action of the Government in the apparent transfer of title by certification or patent, he has made an honest purchase of the land."

This rule was reaffirmed in *Logan vs. Davis*, 233 U. S. 613. In that case it was alleged that Logan was charged with constructive notice of defect in the company's title and so was not a purchaser in good faith. The Court reaffirmed the decision in the Winona case, and said:

"This view of the purpose and meaning of the act was repeated and applied in *Gertgens v. O'Connor*, 191 U. S. 237, and *U. S. vs. Chicago, Milwaukee & St. Paul Railroad*, 195 U. S. 524."

The record shows that the W. R. Pickering Lumber Company and the Southland Lumber Company were each good faith purchasers within the meaning of this act.

Prior to their purchase they had the advice of counsel, who advised them that the title was good. (R. 80-81, 144-156.)

They paid full value for the lands. (R. 80-81, 144-156.)

Inasmuch as constructive notice does not destroy good faith, the remaining question is what actual notice W. R. Pickering Lumber Company and Southland Lumber Company had when they bought.

The Pickering Lumber Company owns the Northeast quarter of the Southwest quarter of Section three, Town three north, Range seven West, Louisiana. The Southland Lumber Company owns the South half of the Northwest quarter and the Northwest quarter of the Southwest quarter, same town and range.

The only actual notice claimed is from possession.

The Pickering Lumber Company bought August 15, 1902; the Southland Lumber Company bought the South half of the Northwest quarter December 30, 1901, and the Northwest quarter of the Southwest quarter February

17, 1903. At the date of these purchases the claimant Grant had his residence on the Southeast quarter of the Northwest quarter. His clearing extended from the forty on which his house was onto the Northeast quarter of the Southwest quarter in dispute here and also onto the Northwest quarter of the Southeast quarter and the Southwest quarter of the Northeast quarter of the same section. As far as the West half of the claim in dispute was concerned, namely, the Southwest quarter of the Northwest quarter and the Northwest quarter of the Southwest quarter, there was at these dates no visible sign of occupancy whatsoever. The West eighty of this claim was virgin timber, without fence, sign, or other visible mark of possession.

Inasmuch as Grant's settlement was not on a technical quarter section, the natural inference to be derived from his settlement and clearing would be that he claimed the four forties on which he had his dwelling and fields, and that he *did not* claim the two forties here in question on which there was then no visible sign of possession.

Assuming, however, that Grant's possession was notice of whatever rights he had in the premises in controversy, let us note what conclusion defendants could have arrived at, provided they had undertaken to trace Grant's alleged rights to their source.

Defendants would have discovered these facts:

1. That the land was within the "place" limits of the grant.
2. That the title of the railroad company had vested in these specific lands November 11, 1871.
3. That at the time of such vesting of the railroad title, the land was public land of the United States, unoccupied, and that to it no individual or other claim had attached.

4. That the lands had been patented to the railroad company March 3, 1885.

5. That the settlement of Grant had been made February 9, 1886, more than fourteen years after the railroad title had vested, and nearly one year after the issue of the patent.

Up to this point no possible inference could be drawn save that Grant was a trespasser upon lands held by the railroad company by a title originating years prior to Grant's occupation. Proceeding further the investigator would have discovered:

6. That August 21, 1886, the railroad company had sold and conveyed to John T. Granger the South half of the Northwest quarter of Section three, and that Grant's residence was established on the East half of the lands so conveyed.

7. That in the fall of 1886 Grant knew from information then received that he was a settler on private property.

8. The Act of Congress under which this controversy has arisen was passed February 8, 1887. At this date the lands upon which Grant had his residence had ceased to be railroad property. The Act of 1887 therefore could have no possible effect upon the North eighty acres of this claim for reasons heretofore urged. (See ante, page 325.)

9. It would therefore appear to the investigator that Grant's residence was on privately owned property, and he would know that such a residence was unavailing as the basis for a homestead claim,—in other words, that Grant had no lawful basis for any claim to the South half of the premises in controversy.

10. The investigator would also have learned that between November 17, 1882, and February 8, 1887, there

had been no actual occupancy or visible signs of possession on the Northwest quarter of the Southwest quarter.

11. June 23, 1888, the last mentioned description was sold and conveyed by the railroad company to private parties, at a time when there was no record claim upon the same and no visible possession thereof.

12. On April 1, 1889, the Northeast quarter of the Southwest quarter was sold and conveyed by the railroad company.

13. On July 30, 1890, the Northwest quarter of the Southwest quarter was transferred by mesne conveyance.

14. December 20, 1890, Grant filed his alleged homestead entry in the local land office, thereby for the first time definitely evidencing an intent to lay claim to the premises in controversy.

Any person having notice of this homestead claim and of the previously occurring facts in relation to the land claimed, would have seen at once that the claim was a nullity, being, as it was, based upon a residence on privately owned property and for lands all of which was privately owned, not only at the date of the filing of the claim but at the date of the claimant's settlement.

15. The contest proceedings which followed Grant's alleged homestead entry conveyed no information additional to that already considered. The Land Office had no jurisdiction over the controversy, the title to the land having before that passed from the United States and from the railroad company into the hands of private owners who were not parties to the contest.

16. Still pursuing his investigation, the inquirer would discover that the statutes of limitation as to United States patents had long since run without any suit having been brought against the record owners of this title to set aside, and without any effort upon Grant's part to assert his alleged claim.

It would have been plain from this tracing back of the history of Grant's possession that at the time of the vesting of the railroad company's title the land was public land of the United States, not in the possession of anyone who, as against the United States, had any right or title whatsoever; that the same was true at the date of the patent, and that at the time when Grant entered into possession and at the time when he undertook to make his homestead entry the land was not subject to entry at all.

C.

The appellants seek to avoid the force of the statute of limitations and the confirmation acts by claiming that the same do not apply. The basis of this contention is the rule that a special act is not repealed or amended by a subsequent general act. *U. S. vs. Nix*, 189 U. S. 199, 205, and similar cases are cited in support of the rule. It is alleged that the Act of February 8, 1887, is a special act which required the consent of the railroad company to make it effective, and that the Acts of March 3, 1887, March 3, 1891, and March 2, 1896, are general acts.

With the rule that a special act dealing with a given subject is not repealed or amended by a subsequent general act dealing with the same subject, *unless it conclusively appears that such was the legislative intent, we have no quarrel*. To the application of that rule to the case in hand we dissent, because:

First: The rule is never applied except when the special and the subsequent general acts cover the same subject in whole or in part, as will be shown by the cases noted below. Now in the case at hand, the Act of February 8, 1887, while undoubtedly a special act applying only to the New Orleans Pacific grant, is a granting act, whereas the act of March 3, 1887, grants nothing. It provides for the adjustment of all railroad grants in

accordance with the decisions of this Court, and as an incident of that adjustment provides for confirmations to good faith purchasers where patents have been erroneously issued to the railroad company. The Act of March 3, 1891, is likewise totally different in subject-matter and object, from that of February 8, 1887. It creates a statute of limitations as to the United States patents. The Act of March 2, 1896, is also totally different in subject-matter and object, from that of February 8, 1887. It creates a statute of limitations, and confirms title to good faith purchasers.

It follows that the special act in question, and the later general acts, having no common object and no common provisions, may and should well stand together. All the cases based on the rule that a special act is not repealed or amended by a subsequent general act are cases where the two are upon the same subject, and where the general act, standing alone, would be broad enough to cover the situation provided by the special act, and no expressed intent as to the special acts being affected appears.

U. S. vs. Nix, 189 U. S. 199, 205,
Townsend vs. Little, 109 U. S. 504,
Ex parte Crowdog, 109 U. S. 556,
Rodger vs. U. S., 185 U. S. 83,
U. S. vs. Healy, 160 U. S. 136,
Frost vs. Wenie, 157 U. S. 46,
U. S. vs. Greathouse, 166 U. S. 601, 602.

These cases demonstrate that where the general statute treats of something not covered by the special statute, each is independent of the other, not modified or limited by the other, and the scope of each is measured by its own language.

Second: Where the Acts of March 3, 1887, March 3, 1891, and March 2, 1896, have been before the courts, they

have been treated as general statutes applicable to all railroad grants.

Logan vs. Davis, 233 U. S. 613,
Knepper vs. Sands, 194 U. S. 476,
Southern Pacific vs. U. S., 228 U. S. 618,
U. S. vs. Southern Pacific, 184 U. S. 49,
U. S. vs. Chicago, Milwaukee & St. Paul, 195 U. S.
524,
Gertgens vs. O'Connor, 191 U. S. 237,
Land & Water Co. vs. San Jose Ranch, 189 U. S.
177,
Winona vs. U. S., 165 U. S. 463,
U. S. vs. Ore. & Cal., 186 Fed. 861, 889,
U. S. vs. Southern Pacific, 157 Fed. 96, 100,
Burke vs. Southern Pacific, 234 U. S. 669, 693,
Iatt vs. Faircloth, 61 So. Rep. 866,
Bodeaw vs. Bonnette, 65 So. Rep. 493.

Third: The most conclusive answer to the position assumed by the appellants, that the Acts of March 3, 1887, and March 3, 1891, and March 2, 1896, do not affect the New Orleans Pacific grant, or the rights of the parties under the Act of February 8, 1887, is found in the following facts: *All of the railroad grants ever made by Congress* (a list of which will be found on pages 269-272 of the History of the Public Domain published in 1884 by the Government) *were special acts which, like the Act of February 8, 1887, had to be accepted by the grantees before becoming effective.* If it be true, as contended by the appellants, that these adjustment, limitation and confirmation acts do not apply to railroad grants because the former are general acts and the latter special, then it must be true that those general acts *cannot apply to any railroad grant whatsoever, since all the railroad grants are special acts which have required the consent of the grantee to render them effective.*

Such a construction of the acts in question will nullify them, since there would be no grants to which they could apply, and this nullification would be brought about, notwithstanding the fact that the Act of March 3, 1887, and the Act of March 2, 1896, are by their express terms applicable to all railroad grants.

Appellants' claim that there can be no good faith upon the part of the grantees of the railroad company, because they claim—

(1) The granting act of March 3, 1871, excepted occupied lands.

(2) The patents to the railroad company recited the language of the Act of March 3, 1871.

(3) The railroad company's deeds are alleged to be quit-claim deeds, and appellants claim that under a quit-claim deed a party cannot be a good faith purchaser.

(4) That the purchasers are chargeable with notice of suit No. 16.

We answer that all of these matters are matters of constructive notice. It is settled law that under the confirmatory provisions of the Acts of March 3, 1887, and March 2, 1896, constructive notice does not destroy the quality of good faith.

U. S. vs. Winona, 165 U. S. 463,

Logan vs. Davis, 233 U. S. 613.

It is not true, as a matter of fact, that the original grant to the New Orleans, Baton Rouge & Vicksburg Railroad Company contained any exception of occupied lands. (See Sec. 9 of the granting act.) The exception there was of lands "sold, reserved or otherwise disposed of by the United States and to which a preemption or homestead claim may not have ATTACHED at the time the line of said road is definitely fixed".

Further, as we have seen, these lands were not in the

possession of anyone at the time that the railroad title vested in the particular lands in question. (See ~~p 13a~~
ante.) No homestead or other claim had "attached".

Kansas vs. Dunmeyer, 113 U. S. 644,
N. P. vs. Colburn, 164 U. S. 386, 387.

The patent issued to the New Orleans Pacific Railway Company recites in a "whereas" the provisions of Section 9 of Act of March 3, 1871, above quoted. (R. 55.) The granting clause of the patent contains no such language. (R. ~~p 202~~) If this is claimed to be an exception, we answer that in *Burke vs. Southern Pacific Railroad Co.*, 234 U. S. 669, 693, it was decided that such an exception was of no effect.

The deed from the New Orleans Pacific Railway Company to its grantees are not, as alleged, quit-claim deeds. They are deeds of bargain and sale, containing a warranty on the part of the grantor against its own acts, and the acts of those claiming under it. (R. 80.) They are in the precise form which was held by this Court to protect a good faith purchaser.

U. S. vs. California Land Co., 148 U. S. 31.

And even if the deeds were strict quit-claim deeds, they would protect a good faith purchaser.

Moelle vs. Sherwood, 148 U. S. 21,
U. S. vs. Cal. Land Co., 148 U. S. 31,
Iatt Lumber Co. vs. Faircloth, 61 So. Rep. 866,
Bodeaw vs. Bonnette, 65 So. Rep. 493.

In *Moelle vs. Sherwood*, upon this point the Court said:

"The doctrine expressed in many cases that the grantee in a quit-claim deed cannot be treated as a bona fide purchaser does not seem to rest upon any sound principle. It is asserted upon the assumption

that the form of the instrument, that the grantor merely releases to the grantee his claim, whatever it may be, without any warranty of its value, or only passes whatever interest he may have at the time, indicates that there may be other and outstanding claims or interests which may possibly affect the title of the property, and therefore, it is said that the grantee in accepting a conveyance of that kind, cannot be a bona fide purchaser and entitled to protection as such; and that he is in fact thus notified by his grantor that there may be some defect in his title and he must take it at his risk. This assumption we do not think justified by the language of such deeds or the general opinion of conveyancers. There may be many reasons why the holder of property may refuse to accompany his conveyance of it with an express warranty of the soundness of its title or its freedom from the claims of others, or to execute a conveyance in such form as to imply a warranty of any kind even when the title is known to be perfect. He may hold the property only as a trustee or in a corporate or official character, and be unwilling for that reason to assume any personal responsibility as to its title or freedom from liens, or he may be unwilling to do so from notions peculiar to himself; and the purchaser may be unable to secure a conveyance of the property desired in any other form than one of quit-claim or a similar transfer of the grantor's interest. It would be unreasonable to hold that, for his inability to secure any other form of conveyance, he should be denied the position and character of a bona fide purchaser, however free, in fact, his conduct in the purchase may have been from any imputation of the want of good faith. In many parts of the country a quit-claim or a simple conveyance of the grantor's interest is the common form in which the transfer of real estate is made. A deed in that form is, in such cases, as effectual to divest and transfer a complete title as any other form of conveyance. There is in this country no difference in their efficacy and operative force between conveyances in the form of release and quit-claim and those in the form of grant, bargain and sale. If the grantor in either case at the time of the execution of his deed possesses any

claim to or interest in the property, it passes to the grantee. In the one case, that of bargain and sale, he impliedly asserts the possession of a claim to or interest in the property, for it is the property itself which he sells and undertakes to convey. In the other case, that of quit-claim, the grantor affirms nothing as to the ownership, and undertakes only a release of any claim to or interest in the premises which he may possess without asserting the ownership of either. If in either case the grantee takes the deed with notice of an outstanding conveyance of the premises from the grantor, or of the execution by him of obligations to make such conveyance of the premises, or to create a lien thereon, he takes the property subject to the operation of such outstanding conveyance and obligation, and cannot claim protection against them as a bona fide purchaser. But in either case if the grantee takes the deed without notice of such outstanding conveyance or obligation respecting the property, or notice of facts which, if followed up, would lead to a knowledge of such outstanding conveyance or equity, he is entitled to protection as a bona fide purchaser, upon showing that the consideration stipulated has been paid and that such consideration was a fair price for the claim or interest designated. The mere fact that in either case the conveyance is unaccompanied by any warranty of title, and against incumbrances or liens, does not raise a presumption of the want of bona fides on the part of the purchaser in the transaction. Covenants of warranty do not constitute any operative part of the instrument in transferring the title. That passes independently of them. They are separate contracts, intended only as guarantees against future contingencies. The character of bona fide purchaser must depend upon attending circumstances or proofs as to the transaction, and does not arise, as often, though, we think, inadvertently, said, either from the form of the conveyance or the presence or the absence of any accompanying warranty. Whether the grantee is to be treated as taking a mere speculative chance in the property, or a clear title, must depend upon the character of the title of the grantor when he made the conveyance; and the opportunities afforded the

grantee of ascertaining this fact and the diligence with which he has presented them, will, besides the payment of a reasonable consideration, determine the bona fide nature of the transaction on his part."

No notice can be claimed from Suit No. 16. At the time this suit was filed the patent title to the lands in question was held by the heirs of Joseph Fisher, the heirs of A. C. Brown and John T. Granger. Not one of these were parties to Suit No. 16. So far as the record shows, no notice of *lis pendens* was ever filed by the Government, and if one had been it would have been constructive notice only.

VI.

As we have seen, the United States, at the time of the filing of this bill had no interest in the controversy because the patent had not been erroneously issued, and if it had been, the United States is barred from any relief by its own statute of limitations, and the title has been confirmed in the appellees, W. R. Pickering Lumber Company and Southland Lumber Company, by reason of their good faith.

There remains the question of the rights of the Intervenor Grant, in whose favor it is asked that the defendant lumber companies be held as trustees.

We invoke the rule that who is prior in time is prior in right.

Shepley vs. Cowan, 91 U. S. 333,
McCreery vs. Haskell, 119 U. S. 327.

It is conclusively shown that the railroad company's right was vested before any occupancy of these lands. It is undisputedly shown that the land on which Grant's residence was established was patented land prior to Grant's settlement and that it was owned by an individual at the time of the passage of the Act of February

8, 1887. Under these circumstances, for reasons before given, we claim that the intervenor has no right whatever, and no interest on which to base his suit.

It is claimed for Grant that by a series of verbal transfers from occupant to occupant some kind of a right had been transmitted to him. Not waiving our contention that all testimony on this subject is incompetent, let us examine this question.

Thomas J. Killen squatted on this land in January, 1877. This possession was after the railroad company title had vested under the Act of March 3, 1871. Killen never made any attempt to make record entry of these lands. We respectfully submit that he never intended to make any such entry as appears from his own testimony. (R. 126.) After occupying three years, Killen made a verbal transfer of his claim and improvements to one Conerly, who occupied for a year, then made a verbal retransfer to Killen, who occupied from 1881 to 1886, when he made a verbal transfer to Grant. Had Killen or Conerly ever had any rights their transfer thereof terminated the same.

Love vs. Flahive, 205 U. S. 195, 202,

Keene vs. Brygger, 160 U. S. 276.

A homestead right is not assignable.

Idem.

And a sale thereof is an abandonment.

R. S. 2297,

Also idem.

An abandonment restores full title to the United States.

Idem.

The next occupant was Grant. He took possession after—

(a) The lands had been legally withdrawn from "pre-emption, private entry and sale";

- (b) The Railroad had acquired a vested right in these specific lands;
- (c) The lands had been patented;
- (d) The lands upon which he established his residence had been sold and conveyed by the Railroad to other parties;
and before;

(e) The Act of February 8, 1887, had been enacted.

It is, however, claimed for him that under the provisions of Section 2 of the Act of February 8, 1887, after the passage of that act he acquired certain rights. This alleged right was urged upon the Court below with wearisome iteration. The claim is based upon the proviso in Section 2 of the Act referred to, which is in these words:

“Provided that all said lands occupied by actual settlers at the date of the definite location of said road, and still remaining in their possession, or in the possession of their heirs or assigns, shall be held and deemed excepted from said grant, and shall be subject to entry under the public land laws of the United States.”

The prior portion of this section had fixed the date of the definite location of the road as November 17, 1882, although, as a matter of fact under the grant, it had been definitely located November 11, 1871.

It is on this clause that the rights of Grant are based.

Manifestly this proviso gives him no right in the land, since it declares that the excepted lands shall be “subject to entry under the public land laws of the United States.” If the proviso were intended to confer any right on the occupant it would not have made the lands “subject to entry” but would have conferred special privileges on the then occupant. The use of the word “assigns” in the proviso certainly cannot confer any right to assign on an occupant. It is simply one of the words used to

define what shall be excepted, namely, lands which were in the possession of an actual settler at the date of the definite location, and remained in his possession or that of his heirs or assigns, at the time of the approval of the act. The proviso cannot be construed as making a homestead right assignable, and certainly cannot be construed as giving a homestead right in lands the title to which had before that passed from the United States into private ownership.

Even if this Act were to be construed as giving such right to actual settlers, it would be so indefinite that it could not be enforced.

In the case of *Oregon & California Railroad Company vs. U. S.*, 238 U. S. 393, there was a proviso in the grant "that the lands granted by the Act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding \$2.50 per acre". (Page 396.) This proviso was held to be a covenant enforceable by the Government. There were certain intervenors in this case, some sixty-four of which had actually settled upon the specified land, and claimed the right to purchase the same of the railroad company for \$2.50 per acre, and they asked that the grant be declared to be in trust for them. There were several thousand other intervenors claiming that this created a trust for the benefit of those who might desire to acquire title thereto, that is they were not actual settlers, but declared an intention to settle with qualifications so to do. The Court held that the language of the proviso conferred no such right upon an actual settler or an applicant to purchase for settlement. The Court said, page 434:

"Certainly the words 'actual settlers' indicate no particular individuals. They describe a class or body of individuals who are without habitation or name."

The Court then quotes from District Judge Wolverton's opinion in the case, and adds:

"We cannot construe the grants as confined or inumbered by rights so indefinite."

As neither the Government, nor the intervening appellants show any rights in these premises, they have no right to harrass us with this litigation, and the bill should be dismissed.

VII.

Even if the Act of February 8, 1887, was to be held to apply to the lands in question, it can only be held to apply to so much of said lands as were "occupied by actual settlers" between November 17, 1882, and February 8, 1887. (See Sec. 2, Act of February 8, 1887, 24 Stat. 391.) The record shows that between those dates a portion of this land was occupied as follows:

In the fall of 1881 one Thomas J. Killen was living on the Southeast quarter of the Northwest quarter of Section three, on which there was a house and a barn. He continued to live there until about February 9, 1886, when the intervenor, Grant, succeeded him in residence and continued until after the passage of the Act of February 8, 1887. We submit that Killen was not an actual settler since he never attempted to perfect a claim to this land and his own testimony (R. page 126) shows that he had no intention of so doing. The lands in question are not a technical quarter section. Residence or cultivation on one forty acres of the claim is not possession of anything more. There never were any improvements or cultivation on the West half of this claim. There were no signs claiming ownership on the west half. There is no testimony of any actual notice of Grant's claim given to any purchaser so far as the West half is con-

cerned. Not only was there no actual occupation of the West half but there was no constructive occupation.

L. R. Hall, 5 L. D. 141,
 Brown vs. C. P. R., 6 L. D. 151,
 N. P. R. vs. Simmons, 6 Id. 172,
 Sweet vs. Doyle, 17 Id. 197,
 Cooper vs. Sanford, 11 Id. 404,
 S. P. M. & M. vs. Donohue, 210 U. S. 21.

In the case of the *Oregon & California Railroad Company vs. U. S.*, 238 U. S. 432, this Court said:

"The word 'actual' expresses a settlement completed, not simply contemplated or possible."

As said by this Court in *Tarpey vs. Madsen*, the railroad company's right ought not to be defeated long years after its title had been fixed, by "fugitive and uncertain evidence of occupation". Occupation accompanied by no visible signs and based merely upon intent is worse than fugitive and uncertain. Fugitive and uncertain testimony may be rebutted but it is impossible to rebut testimony of an intent held only in the mind of the individual and put into words or deeds only after the lapse of long years.

VIII.

Appellants cite and apparently rely, as sustaining their contentions, on

Nelson vs. Nor. Pac., 188 U. S. 108,
 Nor. Pac. vs. Trodick, 221 U. S. 208,

and claimed the Nelson case overrules

Nor. Pac. vs. Colburn, 164 U. S. 383.

1. Nor. Pacific vs. Colburn is not overruled. The facts in that case as shown by the record are:

The lands in dispute were "place" lands granted the

Northern Pacific by the Act of July 2, 1864, 13 Stat. 365. They were at the date of definite location surveyed. (See *Nelson vs. N. P.*, 188 U. S. 132.)

Definite location was July 6, 1882. At that date one Kelly was in possession, but he never made or attempted to make an entry of record. The action was to recover from the railroad company money paid on a contract for the land, on the ground that the railroad company had no title. It was held on the facts that the railroad had title, as Kelly's occupation, unaccompanied by a record entry, was insufficient to except the land from the grant. The case was distinguished in *Nelson vs. Northern Pacific*, 188 U. S. 108, in these words:

"Nor is there any conflict between the decision now rendered and *Northern Pacific Railroad vs. Colburn*, 164 U. S. 383; for, as appears from the opinion and record in that case, the land there claimed to have been occupied by a homestead settler at the date of definite location, was surveyed public land, and the good faith of the occupation was not manifested by an entry, or an attempt at entry, at any time in the local land office. It was held that the inchoate right of the homesteader must be initiated by a filing in the land office. In the present case, as we have seen, the land occupied was unsurveyed, and at the time of such occupancy, the land being unsurveyed, there could not then have been any filing or entry in the land office."

Nelson vs. Northern Pacific, 188 U. S. 108, is readily distinguishable from the case at bar:

(a) It arose under the Northern Pacific grant, which granted lands "free from preemption or other claims or rights at the time the line of said road is definitely fixed". The grant here was of lands "to which a preemption or homestead claim may not have attached at the time the line of said road is definitely fixed".

(b) The Northern Pacific lands were unsurveyed, so no entry of record could be made at date of definite location, while here the lands were surveyed and an entry of record could have been made at any time after 1871.

(c) Nelson occupied in 1881 prior to definite location. He never abandoned, while here Killen occupied "place" lands after the definite location of 1871, and after withdrawal. He then abandoned and the claimant Grant entered, after the definite location of 1882.

(d) The controversy was between Nelson, the original occupant, and the railroad. The rights of no third party had intervened; no limitation had expired; while here, the lands have been sold to third parties, who bought in good faith when no settlers' rights were attached and after the statute of limitations had run, while no settlers' rights had attached.

(e) Entry of record was tendered before patent and refused on the erroneous legal ground that the railroad had the prior right; while in the case at bar entry was tendered after patent and after sale of the lands by the railroad to third parties.

(f) The Act of May 14, 1880, was held to apply in Nelson's case because settlement by Nelson, the claimant, was made before definite location; while here, the settlement made by claimant was made *after* definite location. The Act of May 14, 1880, does not apply where the settlement of the claimant is made after definite location.

Maddox vs. Burnham, 156 U. S. 544,

Wood vs. Beach, Id. 548,

Nelson vs. Nor. Pac. 188 U. S. 133.

Nor. Pac. vs. Trodick, 221 U. S. 208, is equally distinguishable.

(a) The grant in question was the same grant as in the Nelson case, and is equally variant in language from that of the case at bar.

(b) The lands were unsurveyed, as in the Nelson case, and no entry could be made until long after Trodick's settlement. Trodick proffered entry and was refused on the erroneous legal ground that the railroad had the prior right. At the time of the proffered entry no rights of third parties had intervened, while in the case at bar the lands were surveyed, entry could have been made at any time after 1871, claimant proffered no entry until years after definite location and patent, and the rights of third parties had intervened.

(c) The purchasers from the railroad company bought before patent; there was, therefore, no question as to the statute of limitations; while here they bought after the patent and after the statute of limitations had run.

(d) Entry of record was tendered before patent and refused on erroneous legal ground; while here, claimant's entry was tendered five years after patent.

Osborn vs. Froyseth, 216 U. S. 571, also cited by complainant, has no application. That was an indemnity land case, while this is a place land case. The rule as to vesting of "place" and "indemnity" land is so different that discussion of the Froyseth case is useless. It is sufficient to say that the claimant Froyseth occupied prior to the railroad selection, and tendered record entry before the rights of any third parties intervened. He was refused entry on erroneous legal grounds.

We ask an affirmance.

Mark Norris.
MARK NORRIS,
Of Counsel for Defendants.

APPENDIX.

For the purpose of characterizing the good faith with which intervenor asserts that he intended to homestead this land and had always claimed it for that purpose, we call the attention of the Court to the fact that the tax laws of Louisiana require the taxpayer to render to the assessor annually a list and description, with values, of all the property which he owns, and that in not one single year during Grant's occupancy has he ever made to the assessor any claim of ownership to this property. It is to be remembered that the land was patented in 1885 and has been taxable ever since. Although Grant claims he owned the land from 1886 on, and he knew it was patented at least as early as 1887, he has uniformly refused to pay taxes thereon or make claim of ownership to the taxing authorities.

The Louisiana statutes are as follows:

"The term 'property' as herein used means and includes all real estate with the buildings and all other improvements thereon or thereto attached."

3 Marr's An. R. S. La. §6202.

In *Behan vs. Board*, 46 Atl. 170, the Supreme Court of Louisiana held that real estate with the buildings thereon is to be assessed as one item.

The tax law further provides:

"It shall be the duty of each taxpayer * * * to fill out a list of his property in accordance with the form provided in Section 17 of this Act; and he shall make oath thereto * * * and return the same to the assessor before the first day of May of each and every year."

3 Marr's An. I. S. La. §6230.

The oath which the taxpayer is bound to annex is thus provided in the statute:

"I, * * * do solemnly swear * * * that the list on the reverse side of this paper which I have signed is a correct and complete list of all the property of which I am the owner, or have in my possession or under my control in the capacity set forth in said list situated in the Parish of _____, of every kind, character and description which is subject to taxation under the constitution of the State of Louisiana and under Section 1 of the Act of the General Assembly entitled, etc. * * * and further that the number of acres of land has been stated and that the valuation placed thereon by me is true and correct to the best of my knowledge and judgment, and I have given the proper description of said lands and all other taxable property as the law requires."

